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Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

ANDREW J. MILLER,

Petitioner,

v.

MIGUEL VILLEGAS, et al.,

Respondents.

On Petition for Writ of Certiorari to the Indiana Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a plaintiff who successfully challenges a government policy on state administrative procedure grounds is entitled to attorney fees under 42 U.S.C. § 1988 without (1) prevailing on a federal claim, (2) achieving any relief, or (3) prevailing on a state claim that shields a federal claim from ever being adjudicated.

PARTIES TO THE PROCEEDINGS

Petitioner is Andrew J. Miller, Commissioner of the Indiana Bureau of Motor Vehicles.

Respondents are Miguel Villegas, Betty Doe, and Mary Smith[1], on their own behalves and on behalf of a class of those similarly situated.

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[1] Pursuant to an order of the trial court, both "Betty Doe" and "Mary Smith" were permitted to proceed anonymously. App. 51A.

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PETITION FOR WRIT OF CERTIORARI

Andrew J. Miller, in his official capacity as Commissioner of the Indiana Bureau of Motor Vehicles, respectfully petitions the Court for a writ of certiorari to the Indiana Court of Appeals.

OPINIONS BELOW

This case comes to the Court after two trips up and down the Indiana judicial tree, the first concerning the merits, and the second concerning attorney fees. Beginning with the attorney-fees decisions, the denial of transfer by the Indiana Supreme Court is unpublished but is reprinted in the appendix at App. 1A. The opinion of the Indiana Court of Appeals—which, given the Indiana Supreme Court's denial of discretionary review, is the focus of this Petition—is reported as *Silverman v. Villegas*, 894 N.E.2d 249 (Ind. Ct. App. 2008), and is reprinted in the appendix at App. 3A. The trial court's decision awarding attorney fees is unpublished but printed at App. 35A.

The Indiana Supreme Court's merits-stage order disposing of the case as moot is reported as *Villegas v. Silverman*, 855 N.E.2d 1000 (Ind. 2006), and is reprinted in the appendix at App. 41A. The opinion of the Indiana Court of Appeals is reported as *Villegas v. Silverman*, 832 N.E.2d 598 (Ind. Ct. App. 2005), and is reprinted in the appendix at App. 43A. The trial court's original Findings of Fact, Conclusions of Law and Judgment are unpublished but are reprinted in the appendix at App. 69A.

JURISDICTION

The Indiana Court of Appeals ruled in favor of Respondent Miguel Villegas on his claim for attorney fees under 42 U.S.C. § 1988[2] on September 30, 2008. The Court of Appeals denied rehearing on December 3, 2008. The Indiana Supreme Court denied discretionary review on April 6, 2009. On June 30, 2009, Justice Stevens granted an extension of time to file the petition until August 6, 2009. The Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant statutory and constitutional provisions, 42 U.S.C. § 1983, 42 U.S.C. § 1988, Indiana Code § 9-24-9-2, and U.S. Const. amend. XIV, are reprinted in the appendix at 105A.

STATEMENT

This case brings a novel application of 42 U.S.C. § 1988 before the Court where plaintiffs have been awarded Section 1988 fees without (1) prevailing on a federal rights claim, (2) achieving any relief, or (3) prevailing on a state claim that shields the federal rights claim from ever being adjudicated. And it does so in a case brought by illegal aliens seeking

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[2] Respondent Miguel Villegas proceeded in this case on his own behalf and on behalf of a class of those similarly situated. For ease of reference, this brief will refer to the entire Respondent class as "Villegas."

state identification to which they concede they have no right. The Court should take the case to address whether awarding Section 1988 fees to claimants under these circumstances is permissible simply because they happen to have alleged Section 1983 claims in the complaint.

1. On Friday, July 12, 2002, the Indiana Bureau of Motor Vehicles ("BMV") announced that, in order to prevent identity theft, it would on Monday July 15, 2002, begin implementing new identification requirements for driver's license, permit, and state identification card applicants. App. 44A. Previously, in order to obtain a license, permit, or state ID card, applicants were required to present proof of identity, which could be accomplished by providing a wide variety of documents either singly or in combination. App. 44A-45A. Each document was assigned a point value and an applicant's identity was satisfactorily proven when his or her documents totaled six points. App. 44A-45A.

Under the BMV's new July 15, 2002, policy, however, applicants were required not only to document their identities, but also provide valid Social Security numbers and, if necessary, immigration documents. App. 71A-74A. The BMV's new policy did away with the previous point system and instead required applicants to choose from a list of acceptable documents in each of four categories: (1) Social Security Verification; (2) Primary Documents; (3) Secondary Documents; and (4) Proof of Indiana Residency. App. 71A.

The BMV announced the change solely via publication and press conference, without following any of the state standards for promulgating administrative rules. App. 5A. At the same time, the BMV distributed, via publication and its website, a list of documents that applicants could use to satisfy the requirements for obtaining a license or ID card. App. 70A. No formal notice or public hearing took place. App. 70A.

2. In the wake of the BMV's announcement, Villegas, an illegal alien who wished to procure valid state identification but could not do so because of the new requirements, brought this lawsuit asking the Indiana courts to enjoin and declare invalid the BMV's new rule as "unconstitutional and unlawful." App. 81A-82A, 90A-91A, 94A. Villegas claimed that the BMV's rule violated state procedures for promulgating regulations, federal due process and equal protection rights, and the Supremacy Clause of the United States Constitution. App. 93A-94A.

In particular, Villegas protested the possibility that aliens currently *seeking* lawful status (*i.e.*, illegal aliens) were nonetheless unable to receive a license due to lack of required INS documentation. App. 98A-99A. However, Villegas was the only member of the plaintiff class who alleged that his status as a lawful citizen was currently pending before the INS at the time of his application. App. 90A-92A.

3. In the trial court it became clear that another barrier completely distinct from the BMV's new requirements precluded Villegas from obtaining a driver's license. Indiana Code Section 9-24-9-2 already required applicants for licenses and ID cards to provide proof of a valid Social Security number. As an illegal alien, Villegas lacked a Social Security number. App. 76A.

Villegas had not in his complaint challenged the validity of the statute requiring license or ID card applicants to have Social Security numbers. Accordingly, the trial court, recognizing the State's interest in preventing both identity theft and misuse of government machinery to hide illegal aliens, ruled that, without a valid Social Security number, Villegas was ineligible to receive a license or state ID cards, regardless of the new BMV rules. App. 79A. The judge further found that none of the plaintiffs had a Social Security card issued by the Social Security Administration, although at least one, Betty Doe, had previously submitted to an employer a Social Security number registered to two other persons. App. 76A-77A. Another plaintiff, Mary Smith, was counseled by her attorney not to state whether she had similarly given a social security number to an employer. App. 77A. Villegas himself was a suspended driver with a driving record under two different license numbers. App. 76A.

On this record, unsurprisingly, the trial court concluded that Villegas lacked standing to challenge

the BMV rule on either statutory or constitutional grounds and dismissed the case. App. 79A-80A.

4. The Indiana Court of Appeals reversed, however, holding that Villegas had standing because, Section 9-24-9-2 notwithstanding, the BMV had allowed prior applicants without Social Security numbers to sign affidavits attesting to their lack of a Social Security number prior to receiving a license. App. 55A-56A. Thus, the court held that the new identification requirements were the only thing preventing Villegas from obtaining a driver's license and, therefore, he had "suffered concrete and direct injury" that conferred standing to challenge the requirements. App. 56A.

After concluding that Villegas had standing, the Court of Appeals, rather than remanding the case to the trial court for further proceedings, ruled that the BMV had adopted its new identification requirements in violation of Indiana's Administrative Rules and Procedures Act, Indiana Code § 4-22-2, *et seq.* ("ARPA"). App. 68A. Not wanting to render an "advisory opinion," however, the Court of Appeals did not address Villegas' constitutional claims. App. 67A. The Court of Appeals instead remanded the case to the trial court with instructions to enter summary judgment in favor of Villegas on the ARPA claims only. App. 68A. Significantly, the Court of Appeals did *not* enjoin BMV from enforcing its policy.

Before the Court of Appeals certified its decision as final to the trial court—a process akin to issuance of a mandate in federal appellate practice—the BMV asked the Indiana Supreme Court to accept the case on discretionary review. App. 8A. The BMV's Petition to Transfer—in which it argued that the Court of Appeals' decision was contrary to precedent on standing and was an improper advisory opinion on the merits of the rule—automatically stayed certification of the Court of Appeals' judgment to the trial court. Ind. Appellate Rule 65(E).

While the Petition to Transfer was pending in the Indiana Supreme Court, the BMV, following the dictates of ARPA, properly promulgated as a formal administrative rule substantially the same identification requirements that it purported to issue as policy on July 15, 2002. App. 8A-9A. The only significant differences between the original policy and the newly promulgated rule were: (1) the allowance of additional INS documents, including I-797, I-512 and I-131 forms, which could be provided by applicants to prove their lawful immigration status; and (2) the allowance of two additional types of documentation to satisfy the Social Security number requirement: a Social Security card bearing the legend "Valid for Work Only with DHS Authorization" and a Social Security card bearing the legend "Not Valid for Employment." 140 Ind. Admin. Code 7-4-3(e), (f).

In light of this new rule that plainly met the objections of the Court of Appeals, the BMV moved

to dismiss as moot its petition in the Indiana Supreme Court. App. 8A. The Indiana Supreme Court granted the motion. App. 41A-42A.

5. Shortly after the dismissal of the BMV's Petition to Transfer, Villegas filed a motion with the trial court to enter judgment in his favor, which the trial court granted. App. 8A-9A, 38A. Villegas then filed a petition for attorney fees under Section 1988. App. 9A, 35A. The trial court found—without explanation—that Villegas was a prevailing party and granted his application for attorney fees in the amount of $112,468.43. App. 35A-37A.

The BMV appealed the award, but the Indiana Court of Appeals affirmed, holding that Villegas had prevailed on a state statutory claim that was pendent to a "substantial" federal constitutional claim that arose out of a common nucleus of operative fact. App. 30A-31A.

Chief Judge Baker dissented from the court's decision, concluding that the state law claim brought by Villegas—*i.e.*, the administrative procedure claim—was "completely unrelated" to and "wholly separate and distinct from" his federal constitutional claims. App. 32A. Chief Judge Baker also observed that Villegas "did not achieve the goal of [his] federal claims" and caused "no substantive changes" in the identification requirements before the first Court of Appeals case had concluded. App. 33A.

Relying on *Farrar v. Hobby*, 506 U.S. 103 (1992), Chief Judge Baker wrote that Section 1988 "is not intended to produce windfalls for attorneys," App. 32A, and criticized the majority opinion for essentially holding "that a claimant need only advance 'some' type of constitutional claim and succeed on a non-related state claim to become entitled to attorneys' fees under Section 1988, regardless of any failure to prove the constitutional claim or even make a showing that the federal claims were substantial." App. 33A-34A. Because Villegas' counsel "did not receive any recovery that was beneficial to their clients pursuant to their federal claim," App. 34A, Chief Judge Baker concluded, Section 1988 does not authorize an award of attorney fees.

The BMV petitioned the Indiana Supreme Court for transfer, but that court declined to accept the case without comment on April 6, 2009. App. 1A-2A. One Justice, the Honorable Brent Dickson, voted to hear the case but issued no comment respecting the denial of transfer. App. 2A.

REASONS FOR GRANTING THE PETITION

In *Smith v. Robinson*, 468 U.S. 992, 1015 (1984), the Court rejected the proposition that a plaintiff who prevails on a non-fee claim may recover attorney fees under Section 1988 simply because the complaint also happened to have asserted a Section 1983 claim that was ultimately left undecided by the courts. The Court said that, where plaintiffs have

"presented distinctly different claims for different relief, based on different facts and legal theories, and have prevailed only on a nonfee claim, they are not entitled to a fee award simply because the other claim was a constitutional claim that could be asserted through § 1983." *Smith*, 468 U.S. at 1015. Otherwise, plaintiffs could ensure fee awards for "successful judicial efforts" at the pleadings stage, and "[i]t is unlikely that Congress intended such a result." *Id.* at 1015-16.

This case presents a variation on the theory of pleadings-based recovery rejected in *Smith*. Here the trial court, affirmed by a divided Indiana Court of Appeals, awarded Section 1988 fees where the plaintiff prevailed on a non-fee claim "simply because the other claim was a constitutional claim that could be asserted through § 1983." *Id.* at 1015. The Court should grant certiorari and reject the highly anomalous award of Section 1988 fees in this case, where Villegas prevailed on no federal claims, gained no benefits from a judgment or injunction, and was in no way shielded by state claims from pursuing federal claims to judgment. Indeed, in light of the sheer novelty of the fee award in this case, the Court may wish to consider summary reversal.

I. The Rule Applied Below Conflicts With the Court's Precedents Requiring That Plaintiffs Actually Benefit From a Final Judgment to be Eligible for § 1988 Fees

The decision below awarded fees in light of a judgment that afforded Villegas *no* relief whatever. In light of the utter irrelevance to Villegas' interests of the judgment entered on a non-fee claim, the decision below plainly contravenes the Court's precedents requiring a plaintiff to benefit directly from a judgment in order to be a prevailing party.

1. A party asserting a Section 1983 claim prevails and is eligible for Section 1988 fees only when "actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar v. Hobby*, 506 U.S. 103, 109, 111-12 (1992). The Court reinforced this principle in *Buckhannon Board and Care Home v. West Virginia Department of Health and Human Resources*, 532 U.S. 598, 604 (2001), where, in rejecting the catalyst rule, the Court held that there must be a "material alteration of the legal relationship of the parties" to justify Section 1988 fees. The Court stressed that "'[r]espect for ordinary language requires that a plaintiff receive at least *some relief* on the merits of his claim before he can be said to prevail.'" *Id.* at 603 (quoting *Hewitt v. Helms*, 482 U.S. 755, 760 (1987)) (emphasis added).

Even more recently, in *Sole v. Wyner*, 551 U.S. 74 (2007), a unanimous Court held that a plaintiff whose initial success is ultimately undone cannot be a prevailing party. In a passage having particular relevance to this case, the Court stated, "[a]t the end of the fray, Florida's Bathing Suit Rule remained intact, and Wyner had gained no enduring 'chang[e] [in] the legal relationship' between herself and the state officials she sued." *Sole*, 551 U.S. at 2196 (citing *Texas State Teacher's Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989)).

The decision below awarding fees plainly conflicts with the rule of *Farrar*, *Buckhannon* and *Sole* that a plaintiff must "directly benefit[]" in some enduring way from a final judgment in order to be eligible for Section 1988 fees. Villegas won a judgment on a state procedural claim, but never stood to benefit because the BMV corrected the procedural deficiencies before the trial court could even enter judgment. As Chief Judge Baker observed in dissent, even once the trial court entered judgment, "the plaintiffs were still not able to obtain driver's licenses or identification cards as a result of the litigation." App. 28A.

Making clear its departure from *Farrar*, the majority below responded to Chief Judge Baker's criticism by stating that, so long as Villegas achieved his goal of invalidating the BMV's rule, it was irrelevant for section 1988 purposes whether he could actually achieve his overall objective of receiving a license. App. 29A. The court deemed the

properly promulgated rule, which prevented Villegas from obtaining a license, "irrelevant to the determination at hand," stating, "[w]e cannot judge the extent of the plaintiffs' success based upon events occurring after (and as a direct result of) our [earlier] decision. . . ." App. 29A.

The decision below thus rejects the notion that courts must take account of whether the plaintiff benefitted from the litigation before awarding fees. The Court should act to correct this gross misapprehension of the law governing awards of attorney fees under 42 U.S.C. § 1988.

2. Debates among lower courts over when a judgment or injunction "directly benefits" a plaintiff sufficiently to justify fees confirm the waywardness of the decision below. Some courts demand to see an immediate benefit before awarding fees. *See, e.g., Barnes v. Broward County Sheriff's Office*, 190 F.3d 1274, 1279 (11th Cir. 1999); *Martinez v. Wilson*, 32 F.3d 1415 (9th Cir. 1994). Others are content with a merely *conceivable* benefit that may arise in the future. *See, e.g., Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1181 (6th Cir. 1995). Still others examine the extent to which the relief granted not only benefits the plaintiff but also matches the relief sought. *See, e.g., Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 556 (5th Cir. 2008); *Johnson v. Lafayette Fire Fighters Ass'n Local 472*, 51 F.3d 726, 731 (7th Cir. 1995).

What all these tests have in common, however, is *some* requirement that the plaintiff actually benefit from the litigation in order to be eligible for attorney fees. *See Roark & Hardee LP*, 522 F.3d at 556; *Barnes*, 190 F.3d at 1278; *Dambrot*, 55 F.3d at 1192; *Johnson*, 51 F.3d at 731; *Martinez*, 32 F.3d at 1422. Villegas simply does not meet this threshold requirement. He neither benefited immediately from the Court of Appeals' decision on the merits or the trial court's entry of judgment, nor does he have any conceivable hope of benefiting from either in the future. By only establishing that the BMV's initial rule was improperly promulgated, Villegas received no relief. Because Villegas never established any right or ability to receive a state license or ID cards—for himself or for any class members—he ultimately received no benefit from the litigation. At most, Villegas scored the kind of "technical victory" that this Court has previously held "insufficient to support prevailing party status." *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989).

Neither the result nor the rule of decision applied by the Indiana Court of Appeals can be squared with the Court's precedents. The Court's intervention—perhaps even by way of summary reversal—is necessary to ensure justice as well as uniform understanding of the law. *See* 28 U.S.C. § 2106 (authorizing the Court to "reverse any judgment . . . lawfully brought before it for review . . . as may be just under the circumstances").

II. The Court Should Address the Propriety of § 1988 Fee Awards Where Undecided Fee-Generating Claims Are Not Shielded

If the Court determines that summary reversal is not warranted, a second rationale exists for plenary review: The decision below awarded fees for undecided federal claims that Villegas may yet raise in a new lawsuit.

When the BMV properly promulgated the current license and identification rules, that action left Villegas in exactly the same position as when the case started—ineligible for an Indiana license or ID cards. Villegas may, of course, file a new lawsuit against the BMV alleging the exact same unaddressed federal constitutional claims asserted in this case. Yet Villegas has been awarded the full amount of attorney fees allowed under Section 1988 under the counterfactual theory that his success on a state law claim shielded his federal claims. *See* App. 29A. The BMV can find no appellate case upholding an award of Section 1988 fees in such a situation.

To be sure, there are many cases where appellate courts have upheld Section 1988 awards where the plaintiffs prevailed on state law grounds and received all the relief that would have been possible under their unaddressed federal claims. Awards in such circumstances, where the state claim effectively shields the federal claim from review, are wholly appropriate. When enacting Section 1988, Congress anticipated that, under the doctrine of constitutional

avoidance, judges would not rule on Section 1983 constitutional claims if a lawsuit could be resolved on other claims that do not justify on their own an award of attorney fees. *See* H.R. Rep. No. 94-1558, p. 4, n.7 (1976). Where the result is that that civil-rights plaintiff gets all the relief sought, the result can be that non-fee claims ultimately shield fee claims from decision, and thereby deprive the plaintiff of a legitimate chance to be awarded attorney fees, in contravention of federal policy. *See Maher v. Gagne*, 448 U.S. 122, 132 n.15 (1980); *cf. Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-93 (1989) ("The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties *in a manner which Congress sought to promote in the fee statute.*") (emphasis added).

Under those circumstances, the logic of awarding Section 1988 fees where the plaintiff prevails on non-fee claims is sound. That is, without some assurance that fees will not be foreclosed if the court uses state claims to cut off review of constitutional issues, deserving plaintiffs would have a difficult time finding attorneys to take their cases. Valid constitutional claims will often parallel non-fee state (or federal) law claims, and it would not further the policies underlying Section 1988 to deny fees where such non-fee claims actually do shield fee claims. Accordingly, it is appropriate that lower courts regularly award Section 1988 fees where the fee claim is shielded by the non-fee claim. *See, e.g., Gerling Global Reinsurance v. Garamendi*, 400 F.3d

803 (9th Cir. 2005); *Williams v. Hanover Hous. Auth.*, 113 F.3d 1294 (1st Cir. 1997); *Nat'l Helicopter Corp. of Am. v. City of New York*, 1999 WL 562031 (S.D.N.Y. 1999); *Nagy v. Evansville-Vanderburgh Sch. Corp.*, 870 N.E.2d 12 (Ind. Ct. App. 2007); *Int'l Assoc. of Machinists and Aerospace Workers v. Affleck*, 504 A.2d 468 (R.I. 1986).

But that logic does not hold where, as here, the non-fee claim has *not* actually shielded a fee claim from review. The BMV, after its initial rule was invalidated, properly promulgated a rule that was just as restrictive as the original. If Villegas truly believes that the BMV's license and identification rules—which are materially the same now as before—are unconstitutional, nothing prevents him from continuing to challenge the rules.[3]

In this regard it is worth observing that Villegas has put himself in an enviable—though unjust—position. Villegas has received an award of fees for all the work done by his attorneys. However, because his constitutional claims were not reached, and because the underlying judgment has not affected the BMV's ability to enact the same rule, Villegas is in a position to bring another lawsuit and, if successful, recover fees a second time for the same federal claims. Or, should Villegas bring a new

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[3] To date there has been no challenge to the properly promulgated BMV rule, even though Villegas has no greater access to a State license or ID card now than when he first filed this case. A new lawsuit may yet arise, however, after this case is over.

challenge and lose, he will have nonetheless received attorney fees in the first case based upon the mere assertion of meritless federal claims—fees that the State would be unlikely to recover.

Whether Section 1988 permits fees where such anomalous outcomes are reasonably foreseeable is an important issue that the Court has not addressed; certiorari is justified for that reason as well.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: August 6, 2009

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Cause Number
49A02-0708-CV-00754

Lower Court Number:
49D030208PL1448

MILLER, ANDREW J., ET AL -V- VILLEGAS, MIGUEL, ET AL.

You are hereby notified that the Supreme Court has on this day 4/06/09:

This matter has come before the Indiana Supreme Court on a petition to transfer jurisdiction following the issuance of a decision by the Court of Appeals. The petition was filed pursuant to Appellate Rule 57. The Court has reviewed the decision of the Court of Appeals. Any record on appeal that was submitted has been made available to the court for review, along with any and all briefs that may have been filed in the Court of Appeals and all the materials filed in connection with the request to transfer jurisdiction. Each participating member of the Court has voted on the petition. Each participating member has had the opportunity to voice that Justice's views on the case in conference with the other Justices. Being duly advised, the Court now denies the Appellant's

Petition to transfer of jurisdiction. Randall T. Shepard, Chief Justice All Justices Concur, Except Dickson, J., Who Votes to Grant. KM

WITNESS my name and the seal of said Court, this day of 6TH APRIL, 2009

by: \s\ Kevin S. Smith
Clerk, Supreme Court, Court of Appeals and Tax Court

Court of Appeals of Indiana

Joel SILVERMAN, in his official capacity as Commissioner of the Indiana Bureau of Motor Vehicles, Appellant-Plaintiff,

v.

Miguel VILLEGAS, Betty Doe, Mary Smith, on their own behalf and on behalf of a class of those similarly situated, Appellees-Defendants.

No. 49A02-0708-CV-754

Sept. 30, 2008.
Rehearing Denied Dec. 3, 2008.
Transfer Denied Apr. 6, 2009.

OPINION

ROBB, Judge.

Case Summary and Issue

Three illegal aliens instituted a class action against the Commissioner of the Indiana Bureau of Motor Vehicles ("BMV") claiming they were unable to obtain State of Indiana driver's licenses and/or identification cards because of identification requirements implemented by the BMV on July 15, 2002. In a prior appeal, this court held that the identification requirements constituted an administrative rule, which was void because it was not promulgated pursuant to the Indiana

Administrative Rules and Procedures Act ("ARPA"). We therefore instructed the trial court to enter summary judgment in favor of the plaintiffs. *Villegas v. Silverman*, 832 N.E.2d 598, 610 (Ind.Ct.App.2005), *reh'g denied, trans. dismissed* ("*Villegas I*"). The trial court entered judgment in the plaintiffs' favor on their complaint and granted the plaintiffs' motion for attorney fees and costs as prevailing parties pursuant to 42 U.S.C. § 1988 ("section 1988"), ordering the BMV to pay such attorney fees and costs in the amount of $112,468.43. The BMV appeals the trial court's grant of this motion, raising for our review the issue of whether the plaintiffs are prevailing parties pursuant to section 1988 for the purpose of awarding fees. Concluding that the plaintiffs are prevailing parties and that their success in having the identification rule voided merits an award of attorney fees, we affirm.

Facts and Procedural History[1]

As stated in our previous opinion, the underlying facts are these:

> On Friday, July 12, 2002, the BMV announced that effective Monday, July 15, 2002, applicants for Indiana driver licenses, permits, and identification cards would have to present certain documentation proving their identity before obtaining such cards. The new identification requirements are vastly different from the

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[1] We heard oral argument on July 8, 2008, in Indianapolis. We thank counsel for their helpful presentations.

previous ones. The BMV decided to tighten its requirements because of recent increases in identity fraud. The BMV announced its change in the identification requirements by press conference and by publication. Before the BMV's announcement of this change, there was no promulgation pursuant to the ARPA.

* * *

The plaintiffs in this case, all illegal aliens, filed a complaint for declaratory and injunctive relief against the Commissioner of the BMV alleging that the new identification requirements have prevented them from obtaining Indiana driver licenses and identification cards. Specifically, the complaint alleges:

> This is a class action complaint challenging the defendant's new rule for obtaining driver's licenses, learner's permits, and state identification in Indiana. In contrast to earlier practice which properly interpreted Indiana law as only requiring applicants to demonstrate their identity, the new rule, which has been implemented without notice or rule-making, requires applicants to, among other things, demonstrate that they possess a valid United States passport or acceptable documentation from the Immigration and Naturalization Service (hereinafter "INS"), regardless of proof of identity. The rule, which makes it impossible for certain persons to obtain a license, permit or state identification, regardless of proof of

identity, is both unconstitutional and unlawful.

The facts surrounding the individual plaintiffs are as follows. Miguel Villegas entered the United States without documentation. He does not have a social security number. He had an Indiana identification card, but it expired. He also wants a driver license. "Betty Doe" entered the United States without inspection and documentation. She does not have a social security number. Betty Doe had an Indiana driver license, but it was stolen. She requests that her driver license be reissued. Likewise, "Mary Smith" entered the United States without inspection and documentation and does not have a social security number. Her goal is to obtain an identification card and ultimately a driver license.

The complaint was filed in August 2002-approximately one month after the new identification requirements went into effect-but has been twice amended, the last time in June 2003. The plaintiffs also filed a motion for class certification. In March 2004, the plaintiffs filed a motion for summary judgment, and the BMV responded by filing a cross-motion for summary judgment. Following a hearing, the trial court issued Findings of Fact, Conclusions of Law and Judgment in September 2004. Specifically, the trial court concluded that the plaintiffs were not eligible for driver licenses and therefore there was "no standing." The trial court also concluded that it did not have the power to review the BMV's identification requirements and that there was no

merit to the plaintiffs' constitutional arguments. As a result, the trial court held that the "plaintiffs shall take nothing by way of their complaint, and this case be, and is hereby, dismissed." In addition, the trial court granted the plaintiffs' motion for class certification in a nunc pro tunc order. In that order, the trial court defined the class as follows:

> [A]ll current and future persons in Indiana who are, or who will be, required by defendant to produce information concerning their citizenship or immigration status in order to obtain an Indiana driver's license or permit or a state identification card, but who are, or will be, unable to produce the identification mandated by the Indiana Bureau of Motor Vehicle's non-promulgated identification requirements.

832 N.E.2d at 601-04 (citations and footnotes omitted). On appeal, we held that the BMV's new identification requirements constituted an administrative rule and the BMV therefore had to comply with the rulemaking procedures outlined in ARPA, *see* Ind. Code § 4-22-2 et seq., including notice, public hearings, and review by executive branch officials. *Villegas*, 832 N.E.2d at 609-10. Because the BMV did not comply with those procedures, the identification requirements were void and without effect and the trial court erred in entering summary judgment in favor of the BMV. *Id.* at 610. We remanded the case to the trial court "with instructions for the trial court to enter summary judgment in favor of the plaintiffs." *Id.*

The BMV filed a petition for rehearing with this court; the petition was denied. The BMV then filed a petition to transfer to the Indiana Supreme Court simultaneously with a motion for stay of decision on the petition to transfer. The BMV sought a stay "in order to permit it to complete its adoption and promulgation of a rule relating to identification requirements." Order to Show Cause, No. 49A02-0410-CV-823 (Ind., Feb. 6, 2006). When the additional time the BMV sought had passed, the supreme court issued an order to show cause requiring a status report. The BMV responded that an identification rule had gone through the adoption/promulgation process and had become effective on February 2, 2006. "As the unpromulgated identification procedures that were challenged by the Plaintiffs/Appellants in this lawsuit are no longer in effect," appellants' appendix at 106, the BMV requested that the petition to transfer be dismissed as moot. The supreme court dismissed the transfer petition on March 2, 2006, and this court's opinion was certified that same day.

The plaintiffs then filed a motion in the trial court to enter judgment in their favor pursuant to this court's instruction, which the trial court granted:

> IT IS THEREFORE ORDERED that plaintiffs are awarded summary judgment in this cause on their claim that the identification requirements for licenses, permits and state identification cards

> implemented by defendant in July of 2002 are unlawful, void and without effect because defendant failed to promulgate the requirements as required by the Indiana Administrative Rules and Procedures Act, Indiana Code § 4-22-2 *et seq.*

Appellants' App. at 125. The plaintiffs subsequently filed a motion for attorney fees and costs pursuant to section 1988, contending they had prevailed on their state law claims, their state and federal claims arose out of a common nucleus of operative facts, and the federal claims were substantial. The trial court agreed:

> [T]he Court having considered this matter, and being duly advised, finds that plaintiffs are prevailing parties pursuant to 42 U.S.C. § 1988 and they have established their entitlement to their attorneys' fees and costs as set out in their Motion, and,
>
> IT IS THEREFORE ORDERED that the plaintiffs are awarded their costs and fees....

Appellants' App. at 11A. The BMV then initiated this appeal.

Discussion and Decision

The plaintiffs claimed, and the trial court agreed, that they are entitled to attorney fees and costs pursuant to section 1988. The relevant portion of section 1988 states:

(b) Attorney's fees

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title ... the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs....

The BMV argues that the plaintiffs are not "prevailing parties" under section 1988 and are therefore not entitled to recovery of attorney fees.

I. Standard of Review

The parties agree that the standard of review in this case is de novo. Although we ordinarily review a trial court's decision regarding an award of attorney fees under section 1988 for an abuse of discretion, *Daffron v. Snyder*, 854 N.E.2d 52, 55 (Ind.Ct.App.2006), when the trial court makes a determination regarding attorney fees under section 1988 as a result of applying a principle of law, we review the decision de novo, *Nagy v. Evansville-Vanderburgh Sch. Corp.*, 870 N.E.2d 12, 18 (Ind.Ct.App.2007), *trans. denied*.

II. Section 1988 Summary

In *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), the United States Supreme Court reaffirmed the "American Rule" that each party to a lawsuit ordinarily pays its own attorney fees

unless there is express statutory authorization to the contrary. Congress enacted section 1988 in response, authorizing the award of reasonable attorney fees to prevailing parties in civil rights litigation. *See Hensley v. Eckerhart,* 461 U.S. 424, 429, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). The purpose of section 1988 is to ensure effective access to the judicial process for persons with civil rights grievances. See id. Although section 1988 gives trial courts discretion to award attorney fees to the prevailing party, cases interpreting section 1988 have limited that discretion by holding that "a prevailing party should ordinarily recover attorney fees unless special circumstances exist that would render such an award unjust." *Nagy,* 870 N.E.2d at 18; *cf. Farrar v. Hobby,* 506 U.S. 103, 119, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992) ("Section 1988 expressly grants district courts discretion to withhold attorney's fees from prevailing parties in appropriate circumstances....") (O'Connor, J., concurring).

In order to qualify for an award of attorney fees, a plaintiff must be a "prevailing party." "[A] plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar,* 506 U.S. at 111-12, 113 S.Ct. 566. A "prevailing party" is one who has been awarded some relief by the court. *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human Res.,* 532 U.S. 598, 603, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001). "[E]nforceable judgments on

the merits and court-ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees." *Id.* at 604.[2]

Finally, a section 1988 award of attorney fees does not necessarily require that the plaintiff succeed on a constitutional claim. Section 1988 fees may be awarded where the plaintiff prevails "on a wholly statutory, non-civil-rights claim pendent to a substantial constitutional claim," *Maher v. Gagne,* 448 U.S. 122, 132, 100 S.Ct. 2570, 65 L.Ed.2d 653 (1980), as long as the non-fee claim arises out of a "common nucleus of operative fact," *id.* at 132 n. 15, 100 S.Ct. 2570. Such a fee award "furthers the Congressional goal of encouraging suits to vindicate constitutional rights without undermining the longstanding judicial policy of avoiding unnecessary decision of important constitutional issues." *Id.* at 133, 100 S.Ct. 2570 (citation omitted).

III. The Plaintiffs as "Prevailing Parties"

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[2] *Buckhannon* addressed the issue of whether "a party that has failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct" is a prevailing party. 532 U.S. at 600, 121 S.Ct. 1835. The Court held that the term "prevailing party" does not authorize an award of attorney fees without a corresponding alteration in the legal relationship of the parties, and because a defendant's voluntary change in conduct "lacks the necessary judicial imprimatur on the change," *id.* at 605, 121 S.Ct. 1835, the plaintiffs were not entitled to an award of attorney fees.

The plaintiffs' complaint made the following claims regarding the BMV's identification rule:

Factual Allegations

* * *

21. Effective July 15, 2002, the BMV changed the former requirement that identity be proven and introduced new requirements which went beyond mere identification and instead required, among other things, that only citizens or persons with certain immigration statuses could apply for a license or identification card. Additionally, for the first time, any person seeking a license or identification [card] had to have a social security number in his or her own name.

* * *

23. The new requirements were imposed without rule-making or the formal promulgation of regulations.

24. On September 16, 2002, [the BMV] announced modifications to the July 15, 2002 requirements which went into effect on September 30, 2002....

* * *

29. The September 30, 2002 Rule has been, and continues to be, imposed without rule-making or formal promulgation of regulations.

* * *

Statutory Claims

55. Defendant's September 30, 2002 rule imposes a requirement that only persons who have a valid immigration status may be considered for an Indiana driver's license, permit or identification card even if they are Indiana residents. This requirement is not contained in Indiana law and defendant is precluded from creating such a requirement since it alters the substantive law which governs the BMV. The rule change is therefore unlawful.

56. Even if defendant could effect the changes in the law set out in the September 30, 2002 Rule, the rule represents substantive change and therefore cannot occur without rule-making that satisfies the requirements of Ind.Code § 4-22-2-3, et seq. Inasmuch as the rule change was implemented without any rule-making whatsoever, it is unlawful.

Federal Constitutional Claims

57. To the extent that the September 30, 2002 rule discriminates against those who are residents of Indiana and who can prove their identities, but who are unable to obtain the information demanded by the rule, the rule is irrational and arbitrary and furthers no legitimate state goal and violates both the equal protection and due

process clauses of the Fourteenth Amendment to the United States Constitution.

58. To the extent that the September 30, 2002 Rule gives defendant the ability to determine which non-citizens have "acceptable INS documentation" the rule violates the Supremacy Clause, U.S. Constitution, Art. VI.

State Constitutional Claims

59. The disparate treatment accorded by the September 30, 2002 Rule, as summarized above, also violates Art. I, § 23 of the Indiana Constitution since it is not reasonably related to inherent characteristics distinguishing the putative class.

Requested relief

WHEREFORE, plaintiffs request that this Court:

* * *

2. Enter a declaratory judgment that the defendant has violated Indiana law and the United States and Indiana Constitutions as specified above.

3. Enter a preliminary injunction, later to be made permanent, enjoining the September 30, 2002 Rule.

Appellants' App. at 74-80 (Third Amended Class Action Complaint for Declaratory and Injunctive

Relief).

The BMV contends that the plaintiffs are not prevailing parties in this litigation and that the trial court's award of attorney fees pursuant to section 1988 is erroneous as a matter of law for three reasons: 1) the trial court determined that the plaintiffs had suffered no injury with respect to their federal claims and because this determination was undisturbed on appeal, the plaintiffs did not prevail on their federal claims; 2) the plaintiffs' federal claims are not "substantial" and do not have a "common nucleus of operative fact" with pendent state statutory claims; and 3) the plaintiffs failed to obtain their objective with respect to their federal claims. We will address each of the BMV's contentions in turn. As noted above, we begin from the premise that attorney fees are to be awarded unless otherwise unjust. *See Nagy*, 870 N.E.2d at 19.

A. Effect of *Villegas I* on Original Trial Court Order

The trial court's original decision on the plaintiffs' complaint included the following conclusions:

> 8. Illegal aliens, such as plaintiffs, are not a suspect class implicating constitutional scrutiny under the complementary equal protection clause of the United States Constitution and privileges and immunities clause of the Indiana Constitution. Illegal, or undocumented, aliens do not have the immutable characteristic of a truly

suspect class because their status is the product of conscious, indeed, unlawful action.

9. The plaintiffs cannot demonstrate any injury recognized by the above said Constitutional provisions based on their illegal status in this country.

10. Where there is no recognized injury, there is no standing....

Appellants' App. at 99. On appeal, the plaintiffs argued, *inter alia,* that the new identification requirements violated the Due Process Clause, the Equal Protection Clause, and the Supremacy Clause of the United States Constitution. *Villegas,* 832 N.E.2d at 610 n. 15. We decided the case on the rule-making issue, however, and declined to address the constitutional arguments: "Because the requirements are void and without effect, we do not address these constitutional arguments. To do so would be to render an advisory opinion. We have no way of knowing whether the BMV in the future will promulgate the same identification requirements or different ones." *Id.*

The BMV argues the plaintiffs did not prevail on their federal claims because the trial court made a determination against them and this court "specifically took no action to invalidate the previous determination" of the trial court, appellants' brief at 10, thus allowing the trial court's conclusion with respect to the federal claims to stand. Section 1988 fees cannot be awarded

where the plaintiff prevails on a state law claim but a federal law claim is decided against her. *See Bray v. Alexandria Women's Health Clinic,* 506 U.S. 263, 285, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993) (determining on appeal of district court's decision in favor of the plaintiffs on state and federal claims that the plaintiffs were not entitled to relief on their federal claim and therefore were not entitled to attorney fees and costs under section 1988). The BMV cites *Luria Bros. & Co. v. Allen,* 672 F.2d 347 (3d. Cir.1982), to support its position that the original ruling of the trial court against the plaintiffs on their federal claims remained undisturbed after *Villegas I.* In *Luria Bros.,* the Third Circuit considered a district court ruling in favor of a plaintiff on federal constitutional and state statutory claims and its award of section 1988 fees. The Third Circuit reversed the district court on the federal constitutional claim, affirmed the judgment on the state claim, and reversed the award of attorney fees. *Id.* at 349. The distinction between *Luria Bros.* and *Bray,* and this case, however, is that in *Luria Bros.* and *Bray* there were specific appellate determinations against the plaintiffs on the merits of their federal claims. Here, the plaintiffs' federal claims were specifically left undecided by the appellate court.[3] Moreover,

[3] The BMV also argues that the plaintiffs could have requested transfer as to the federal constitutional issue left unanswered by this court, but they did not do so and "[i]t is now much too late for the Plaintiffs to seek further review." Brief of Appellants at 12-13. On the basis of this court's decision, however, there was no reason for the plaintiffs to seek transfer: the practical result of this court's opinion was that there was no rule imposing new identification

the trial court did not make a determination on the merits of the federal claims, but merely determined that the plaintiffs had no standing to raise the claims.[4]

In general, a trial court's judgment that has been reversed is a nullity, and a reversal returns the parties to the position they occupied prior to the judgment. *Tioga Pines Living Ctr., Inc. v. Indiana Family and Soc. Servs. Admin.*, 760 N.E.2d 1080, 1088 (Ind.Ct.App.2001), *trans. denied; see also Doughty v. State Dep't of Pub. Welfare*, 233 Ind. 475, 477-78, 121 N.E.2d 645, 646 (1954) ("If the appellate tribunal finds the judgment was erroneous and reverses it, such judgment is forthwith vacated and set aside and no longer remains in existence. The parties are then restored to the position they held before the judgment was pronounced and must take their places in the trial

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requirements on those seeking driver's licenses or identification cards, and therefore, there was no action upon which the plaintiffs could base a claim of a constitutional violation. Moreover, the plaintiffs are not seeking review of the merits of their federal constitutional claims by claiming entitlement to section 1988 fees.

[4] The BMV seems to acknowledge this later in its brief, stating that "No determination has ever been made that suggests that the BMV's identification requirements deprived the Plaintiffs of due process or equal protection. No determination has been made that the requirements in some fashion violate the supremacy clause because they infringe upon the INS's legal authority." Appellant's Brief at 19. At the very least, this statement seems to be in conflict with the BMV's argument that the federal claims were decided adversely to the plaintiffs by the trial court.

court at the point where the error occurred...."). The plaintiffs point to several section 1988 cases in which a trial court found against plaintiffs on both state and federal claims, an appellate court reversed on state law grounds, and it was subsequently determined that the plaintiff was a prevailing party entitled to section 1988 fees. *See, e.g., Maryland Green Party v. State Bd. of Elections,* 165 Md.App. 113, 884 A.2d 789, 798 (2005) (addressing issue of whether the plaintiff's federal claim "was decided, for purposes of section 1988, when it was determined adversely by the circuit court on summary judgment but, on appeal, was not addressed in the appellate opinion that reversed only on a state law ground" and holding that the appellate court's reversal rendered the federal claim undecided for purposes of section 1988), *cert. denied,* 390 Md. 501, 889 A.2d 418 (2006).

The general principles announced by our caselaw regarding the effect of an appellate reversal and section 1988-specific case law from other jurisdictions are contrary to the BMV's argument that our decision in *Villegas I* had no effect on the trial court's earlier determination regarding the plaintiffs' federal claims. We agree with the plaintiffs that the federal claims were "undecided" when the trial court issued its attorney fee order. We must now consider whether the plaintiffs' success on their state law claim entitles them to "prevailing party" status for purposes of section 1988 attorney fees.

B. Substantiality

The BMV argues that even if the plaintiffs' federal claims are undecided, they do not meet the test for "substantiality." A constitutional claim is "substantial" for this purpose unless it is "so attenuated and unsubstantial as to be absolutely devoid of merit, wholly insubstantial, obviously frivolous, plainly insubstantial, or no longer open to discussion." *Hagans v. Lavine,* 415 U.S. 528, 537, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974). "A claim is insubstantial only if its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy." *Id.* at 538, 94 S.Ct. 1372 (quotation omitted). This standard is a "minimal" one. *City of Gary v. Redmond,* 489 N.E.2d 543, 549 (Ind.Ct.App.1986). We need not address the actual merits of a claim in order to determine whether it meets the substantiality test. *Nagy,* 870 N.E.2d at 22. "All we need determine is whether the [federal claim] was 'obviously without merit,' 'obviously frivolous,' or 'no longer open to discussion.' " *Id.* (quoting *Hagans,* 415 U.S. at 537, 94 S.Ct. 1372).

The BMV argues that "it is not likely that the courts would find any merit in the federal claims that were advanced by the Plaintiffs in this case," br. of appellants at 19, citing footnote 11 of *Villegas I* in which we acknowledged new federal legislation requiring state-issued driver's licenses and identification cards to include social security and

lawful status information in order to be accepted by the federal government for any official purpose. 832 N.E.2d at 606 n. 11. As we also noted, however, "[t]his new federal law has no impact on the BMV's current system," *id.*, and its enactment does not necessarily mean that the issue of whether requiring such information is constitutional is "no longer open to discussion." The BMV also argues that the plaintiffs' federal claims are insubstantial because the trial court determined that they were. As noted in Section III.A., *supra,* the trial court's determination is a nullity. Moreover, the trial court decided the plaintiffs' federal constitutional claims on the basis of standing, not on their merits.

The plaintiffs claimed that the BMV's new identification rule violated the due process, equal protection, and supremacy clauses of the United States Constitution. The BMV has not cited, and our own research has not disclosed, any case law from this jurisdiction or others with a holding foreclosing the plaintiffs' claims. *Cf. City of Gary,* 489 N.E.2d at 550 (holding that constitutionality of ordinance allowing emergency action by building commissioner in removing any immediate danger caused by unsafe premises "cannot be seriously contested" and plaintiff's constitutional claim is therefore not substantial for section 1988 purposes where case law has established constitutionality of summary governmental action in emergency situations). That is not to say the plaintiffs would necessarily have prevailed on the merits of their claims. However, when judging the plaintiffs' claims by the "admittedly ... rather low standard,"

Nagy, 870 N.E.2d at 22, of substantiality set forth in *Hagans*, the constitutional claims at issue cannot be said to be either so frivolous or so insubstantial as to prevent prevailing party status. See *Doe v. Edgar*, 1989 WL 91805 at *3 (N.D.Ill., Aug.4, 1989) (declining to grant the state's motion for summary judgment on undocumented aliens' class action alleging that an Illinois statute which required every application for a driver's license to include the applicant's social security number violated the equal protection clause by making it impossible for members of the class-and only that class-to obtain driver's licenses).

C. Common Nucleus of Operative Fact

The BMV also argues that the plaintiffs' federal claims do not share a "common nucleus of operative fact" with the successful state law claim.[5] Claims arise from a common nucleus of operative fact where fee-supporting claims are so interrelated with non-fee claims that plaintiffs would ordinarily be expected to try them all in one judicial proceeding. *See United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 16 L.Ed.2d

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[5] The BMV quotes language from *Nagy* regarding when a claim is "unrelated to a successful claim." See Appellant's Brief at 17. The quoted language is from a section of the opinion concerning the determination of an appropriate fee upon having already determined that the plaintiffs were prevailing parties. *See Nagy*, 870 N.E.2d at 24-25. Further, the BMV's argument focuses primarily on the results the plaintiffs achieved, which again is an argument more suitable to the issue of determining a reasonable fee. We will address that issue in Section IV, *infra*.

218 (1966). "Courts have taken an extremely liberal view on nearly every interpretative question that has arisen thus far under [section] 1988." *Gates v. Collier*, 616 F.2d 1268, 1275 (5th Cir.1980).

The BMV argues that "there is no real factual connection between the state rule adoption claim and the federal constitutional claims.... [A] claim that identification requirements need to be adopted as a rule according to state law does not automatically implicate the constitutionality of the substance of any identification requirements." Reply Brief of Appellants at 6-7. The BMV is correct that the plaintiffs' adjudicated state claim concerned the process behind the identification rule, whereas the undecided constitutional claims concerned the substance of the rule. However, all of the plaintiffs' claims arise from the BMV's adoption of a rule with new identification requirements for obtaining driver's licenses and identification cards. All of the plaintiffs' claims sought to invalidate the rule, for either procedural or substantive reasons. Accordingly, we hold that the non-fee claim arose out of the common nucleus of operative facts implicated by the constitutional claims. *See California State Outdoor Advertising Assoc., Inc. v. California*, 2006 WL 662747 at *9 (E.D. Cal., Mar. 16, 2006) (holding that plaintiffs' claim that a billboard permit renewal fee imposed by the state department in charge of regulating outdoor advertising without following the rulemaking provisions of the state's administrative procedures act had a common nucleus of operative fact with the plaintiffs' First Amendment claim because both

arose from defendants' collection of permit renewal fees pursuant to an invalid fee-setting regulation and both sought to invalidate the fee set by the defendants; therefore, plaintiffs' success on the administrative claim entitled them to section 1988 fees).[6]

IV. Reasonable Attorney Fee

Although the BMV never specifically argues the reasonableness of the fee award by the trial court, an overarching argument throughout its brief and at oral argument was that the plaintiffs, while winning a minor point, nevertheless lost the battle. The BMV acknowledges the plaintiffs' success on their claim that the identification requirements were unlawful for not being formally adopted as a rule; however, the BMV notes that because the plaintiffs' constitutional claims were not affirmatively decided in their favor, and the BMV has now properly promulgated the identification requirements as a rule, the plaintiffs have failed to achieve the objective of their constitutional claims-that is, they are still unable to obtain driver's licenses or identification cards. The BMV argues that the plaintiffs' victory on their state rule-making claim is so nominal in relation to the relief

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[6] Although the dissent interprets our decision as holding that "a claimant need only advance 'some' type of constitutional claim and succeed on a non-related state claim" to become a prevailing party, slip op. at 24, we have specifically determined in the foregoing discussion that the plaintiffs' constitutional claims were sufficient to meet the substantiality test and to show a common nucleus of operative fact.

sought by the complaint that they should not be considered prevailing parties for section 1988 purposes.

Although the Supreme Court has previously noted that "[w]here the plaintiff's success on a legal claim can be characterized as purely technical or de minimis, a district court would be justified in concluding that even the 'generous formulation' [of the term 'prevailing party'] has not been satisfied," *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989), more recently, the Supreme Court has clarified that "the prevailing party inquiry does not turn on the magnitude of the relief obtained," *Farrar*, 506 U.S. at 114, 113 S.Ct. 566; *see also Garland*, 489 U.S. at 789, 109 S.Ct. 1486 (noting that the degree of the plaintiff's success in relation to the other goals of the lawsuit is a factor critical to the determination of the size of a reasonable fee, not to the eligibility for a fee award at all). Thus, the BMV's argument with respect to the results of the litigation is more accurately described as a challenge to the reasonableness of the fee awarded by the trial court.[7]

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[7] In *Daffron*, this court considered a trial court's order denying a request for section 1988 fees. 854 N.E.2d at 53. Holding that the plaintiff was a prevailing party, we reversed the trial court's decision and remanded with instructions to award the plaintiff attorney fees. *Id.* at 57. On rehearing, the defendants claimed that we "usurped the trial court's discretionary function to determine whether to award attorney's fees...." *Daffron v. Snyder*, 856 N.E.2d 1245, 1246 (Ind.Ct.App.2006). The defendants argued that the only issue

The "generous formulation" of the prevailing party standard "brings the plaintiff only across the statutory threshold." *Hensley,* 461 U.S. at 433, 103 S.Ct. 1933. The court must still determine what fee is reasonable. *Id.* As a general rule, the starting point is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *Nagy,* 870 N.E.2d at 24. Other considerations may then lead the court to adjust the fee upward or downward. *Hensley,* 461 U.S. at 434, 103 S.Ct. 1933. One of these considerations is the results obtained, especially when the plaintiff has made multiple claims but has succeeded on only some of

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before the court was whether the plaintiff was a prevailing party. *Id.* at 1246 n. 1.

However, even in their own brief to this Court, the [defendants] framed the issue before us as follows: "Whether it was an abuse of discretion for the trial court to determine that this case was settled for mere nuisance value, that the [plaintiff] was not a prevailing party and that the [plaintiff] was not entitled to attorney fees. Further, the briefs of both parties are replete with references to ... the propriety of an award of attorney's fees *outside* the issue of whether [plaintiff] was a prevailing party."

Id. (emphasis in original). We therefore disagreed with the defendants' position that we could consider *only* whether the plaintiff was a prevailing party. The BMV states its issue in this case as "whether the trial court's decision to award attorney fees is contrary to 42 U.S.C. § 1988...." Brief of Appellants at 1. Given that section 1988 authorizes only a "reasonable attorney's fee" and given the nature of the BMV's arguments, we believe it is appropriate to address the reasonableness of the fee awarded by the trial court even in the absence of a specific articulation of the issue.

them. *Id.*

> [T]he extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees under 42 U.S.C. § 1988. Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee. Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised. But where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained.

Hensley, 461 U.S. at 440, 103 S.Ct. 1933.

The BMV cites the following language from *Nagy:*

> A claim is considered unrelated to a successful claim when the relief sought on the unsuccessful claim is intended to remedy a course of conduct entirely distinct and separate from the course of conduct which gave rise to the injury on which relief was granted.

870 N.E.2d at 25. This language was employed in consideration of a reasonable fee to be awarded to the prevailing party. Concluding that the plaintiffs successful state constitutional claim and

unresolved federal constitutional claims were "not unrelated," and that the successful state claim "gave them all they could reasonably ask for," we concluded that they were entitled to be awarded reasonable attorney fees for work performed on both claims. *Id.*

The BMV mentions several times in its brief, and mentioned several times at oral argument, that because the identification rule was promulgated pursuant to ARPA after this court's decision in *Villegas I,* the plaintiffs have not been benefited by winning their state claim because they are still unable to obtain driver's licenses. However, the BMV's argument is misplaced. The identification rule promulgated by the BMV after *Villegas I* is not before us and is irrelevant to the determination at hand. We cannot judge the extent of the plaintiffs' success based upon events occurring after (and as a direct result of) our decision in *Villegas I;* we are concerned only with the identification rule upon which the plaintiffs' challenge was based and the proceedings surrounding that rule. *See Villegas,* 832 N.E.2d at 610 n. 15 ("We have no way of knowing whether the BMV in the future will promulgate the same identification requirements or different ones."). Although the court did not reach the plaintiffs' constitutional claims, the court in *Villegas I* gave the plaintiffs all the relief they had asked for: the identification rule was declared void and without effect.[8] *Cf. Farrar,* 506 U.S. at 114-15,

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[8] The dissent notes that the trial court's judgment subsequent to *Villegas I* "did not afford the plaintiffs an opportunity to obtain driver's licenses or identification cards in the absence

113 S.Ct. 566 (holding that a civil rights plaintiff who recovers damages in any amount qualifies as a prevailing party, but because the plaintiffs in this case recovered nominal damages of one dollar on a seventeen million dollar claim, their limited success did not merit an award of attorney fees). The plaintiffs obtained substantial relief, and we conclude the trial court properly awarded section 1988 fees to the plaintiffs. Because the BMV does not claim that the hours expended or the rates charged by the plaintiffs' attorneys as set forth in their affidavits are unreasonable,[9] we affirm the trial court's fee order in its entirety.

Conclusion

The plaintiffs are prevailing parties for succeeding on a state statutory claim that is

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of compliance with the challenged identification requirements." Slip op. at 24. However, the challenged identification requirements were null and void following *Villegas I;* the newly-promulgated identification requirements are part of a new rule, the constitutionality of which is subject to a new challenge.

[9] We agree with the dissent's statement that Section 1988 was not intended to produce windfalls for attorneys. *See* slip op. at 23 (citing *Farrar*, 506 U.S. at 115, 113 S.Ct. 566). We rest our decision regarding attorney fees on our determination, based upon the generous formulation of the "prevailing party" test, that the plaintiffs are prevailing parties here, and the fact that the BMV did not specifically challenge the amount of fees awarded to the plaintiffs or attempt to parse the fees such that those fees incurred in litigating the successful state law claim could be separated from those incurred in litigating the undecided constitutional claims.

pendent to a substantial federal constitutional claim that arises from a common nucleus of operative fact. Moreover, the plaintiffs' success in having the identification requirements declared void merits an award of attorney fees. The trial court's section 1988 attorney fee award is therefore affirmed.

Affirmed.

RILEY, J., concurs.
BAKER, C.J., dissents with separate opinion.
BAKER, Chief Judge, dissenting.

I respectfully dissent from the majority's determination that the plaintiffs were the prevailing parties in this action for the purpose of awarding attorneys' fees and costs under 42 United States Code section 1988 (Section 1988). As the United States Supreme Court observed in *Farrar v. Hobby*, a "plaintiff prevails when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." 506 U.S. 103, 111-12, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992). Moreover, in *Nagy v. Evansville-Vanderburgh School Corp.*, this court observed that with regard to Section 1988 claims, "[p]arties are considered to have 'prevailed' in litigation if they succeed on any significant issue in litigation which achieves some benefit the parties sought in bringing suit." 870 N.E.2d 12, 19 (Ind.Ct.App.2007) (citing *King v. Ill. State Bd. of Elections*, 410 F.3d 404, 414 (7th Cir.2005)).

However, Section 1988 is not intended to produce windfalls for attorneys. *Farrar*, 506 U.S. at 115, 113 S.Ct. 566.

In this case, before the first appeal, the trial court determined that the plaintiffs had suffered no injury with regard to their federal constitutional claims. In essence, the trial court found that the plaintiffs' federal constitutional claims were not viable, and we did not overturn that decision on appeal. *Villegas v. Silverman*, 832 N.E.2d 598 (Ind.Ct.App.2005). Indeed, we did not strike down the BMV's identification requirements as contrary to law. Rather, we only determined that such identification requirements amounted to rule-making and the BMV was obligated to comply with Indiana Administrative Rules and Procedures Act (ARPA)[10] with regard to notice, public hearings, and review by branch officials in promulgating those rules. *Id.* at 609-10. Nowhere in our opinion did we declare that the substance of the rule had changed, and we found it unnecessary to reach the merits of the plaintiffs' constitutional claims. *Id.* at 610 n. 15.

That said, it is apparent to me that the plaintiffs' arguments with regard to the BMV's failure to comply with ARPA are completely unrelated to the state and federal constitutional claims that were advanced in the complaint. Put another way, the BMV's failure to adopt the identification requirements as rules was wholly separate and distinct from whether the BMV could

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[10] Ind. Code § 4-22-2 et seq.

constitutionally employ identification requirements that precluded the plaintiffs from obtaining driver's licenses and identification cards.

I also note that the plaintiffs did not achieve the goal of their federal claims, which was the opportunity to obtain Indiana driver's licenses and identification cards. In fact, the trial court's judgment subsequent to the first appeal did not afford the plaintiffs an opportunity to obtain driver's licenses or identification cards in the absence of compliance with the challenged identification requirements. Rather, the trial court only determined that the process that the BMV used was defective, and the plaintiffs caused no substantive changes in how the identification process was handled by the BMV before the first case on appeal had concluded.

As the majority observes, the BMV formally and properly adopted rules that were essentially the same as those that it had not previously promulgated. Thus, it cannot be said that the plaintiffs achieved any substantive change in the law as a result of their lawsuit, and they were not granted any additional affirmative relief in the trial court's order on remand. In short, the plaintiffs were still not able to obtain driver's licenses or identification cards as a result of the litigation.

The majority seemingly takes the view that a claimant need only advance "some" type of constitutional claim and succeed on a non-related state claim to become entitled to attorneys' fees

under Section 1988, regardless of any failure to prove the constitutional claim or even make a showing that the federal claims were substantial. To me, such a notion contradicts the spirit of the Section 1988 provisions. Because the plaintiffs' counsel did not achieve any recovery that was beneficial to their clients pursuant to their federal claim, I believe that the award of attorneys' fees in this case was not warranted under Section 1988. Thus, I would reverse the judgment of the trial court.

State of Indiana)
)
County of Marion)

In the Marion Superior Court
Room No. 3
Cause No. 49D03-0208-PL-1448

MIGUEL VILLEGAS, *et al.*,)
)
Plaintiffs,)
)
v.)
)
JOEL SILVERMAN, *et al.*,)
)
Defendant.)

ORDER

Come now plaintiffs having filed their Motion for Attorneys' Fees and Costs Pursuant to 42 U.S.C. § 1988, and the Court having considered this matter, and being duly advised, finds that plaintiffs are prevailing parties pursuant to 42 U.S.C. § 1988 and they have established their entitlement to their attorneys' fees and costs as set out in their Motion, and,

IT IS THEREFORE ORDERED that the plaintiffs are awarded their costs and fees as follows:

To the ACLU of Indiana

Ken Falk attorney fees:	$79,950.00
Kandy Kendall (legal assistant) fees:	727.50
Costs:	1,476.86
TOTAL:	**$82,154.36**

To Rafael Ramirez

Rafael Ramirez fees:	$ 2,770.57
TOTAL:	**$ 2,770.57**

To Cohen and Malad

Richard Shevitz attorney fees:	$ 6,240.00
Scott Gilchrist attorney fees:	17,362.50
Arend J. Abel attorney fees:	1,106.00
Irwin B. Levin attorney fees:	2,722.50
Eric C. Pavlack attorney fees:	112.50
TOTAL:	**$27,543.50**

IT IS ORDERED that the above sums shall be paid at the earliest opportunity.

IT IS FURTHER ORDERED that the plaintiffs shall have ten days from this date to submit any motions for supplemental fees for any time spent in this matter subsequent to the submission of the September 5, 2006 Motion for Attorneys' Fees and Costs.

Jul 03 2007 — by \s\ Patrick McCarty
Date — Judge, Marion Superior Court

cc:

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State of Indiana)
)
County of Marion)

In the Marion Superior Court
Room No. 3
Cause No. 49D03-0208-PL-1448

MIGUEL VILLEGAS, *et al.*,)
)
Plaintiffs,)
)
v.)
)
JOEL SILVERMAN, *et al.*,)
)
Defendant.)

JUDGMENT FOR PLAINTIFFS

Comes now the Indiana Court of Appeals, having reversed this Court's Judgment of September 3, 2004, and having specifically held that the identification requirements for licenses, permits and state identification cards implemented by defendant in July of 2002 are unlawful because defendant failed to promulgate the requirements as required by the Indiana Administrative Rules and Procedures Act, Indiana Code § 4-22-2 *et seq*, and the Indiana Court of Appeals having specifically directed this Court to enter summary judgment in favor of the named plaintiffs, which includes the named plaintiffs and the plaintiff class, and the Indiana Supreme Court having dismissed

defendant's Petition to Transfer, and the Court of Appeals decision having been certified as required by Rule 65(E) of the Indiana Rules of Appellate Procedure, this Court now enters Judgment in this matter on behalf of all plaintiffs which includes the certified class defined as:

> all current and future persons in Indiana who are, or who will be, required by defendant to produce information concerning their citizenship or immigration status in order to obtain an Indiana driver's license or permit or a state identification card, but who are, or will be, unable to produce the identification mandated by the Indiana Bureau of Motor Vehicle's non-promulgated identification requirements.

and,

IT IS THEREFORE ORDERED that plaintiffs are awarded summary judgment in this cause on their claim that the identification requirements for licenses, permits and state identification cards implemented in July of 2002 are unlawful, void and without effect because defendant failed to promulgate the requirements as required by the Indiana Rules and Procedures Act, Indiana Code § 4-22-2 *et seq.*

SO ORDERED.

Aug 16 2006 — by \s\ Patrick McCarty
Date — Judge, Marion Superior Court

cc:

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In the Indiana Supreme Court

Miguel VILLEGAS, *et al.*,
Appellants (Plaintiffs below),

v.

Joel SILVERMAN, in his official capacity as Commissioner of the Indiana Bureau of Motor Vehicles,
Appellee (Defendant below).

Court of Appeals
No. 49A02-0410-CV-823

ORDER DISMISSING TRANSFER PETITION

The Court of Appeals issued an opinion in this appeal, Villegas v. Silverman, 832 N.E.2d 598 (Ind. Ct. App. 2005). On November 21, 2005, the Defendant filed a petition to transfer jurisdiction over the appeal to this Court pursuant to Appellate Rule 57. The plaintiffs have opposed transfer. On February 6, 2006, this Court ordered the parties to show cause in writing explaining the status of the Indiana Bureau of Motor Vehicle's new rule relating to identification requirements and explaining why this case should not be dismissed as moot. Both sides have responded to that order to show cause.

The Court has reviewed the opinion of the Court of Appeals, the materials filed in conjunction with this appeal, and the materials filed in connection

with the request to transfer jurisdiction, including the responses to the order to show cause. Each Justice of the Court has had the opportunity to voice his views in conference with the other Justices and has voted to DISMISS the Defendant's transfer as moot.

The Clerk is directed to send a copy of this order to all counsel of record.

Done at Indianapolis, Indiana, this 2nd day of March, 2006.

by \s\ Randall T. Shepard
Randall T. Shepard
Chief Justice of Indiana

All Justices concur.

Court of Appeals of Indiana

Miguel VILLEGAS, et al., Appellants-Plaintiffs,

v.

Joel SILVERMAN, in his official capacity as Commissioner of the Indiana Bureau of Motor Vehicles, Appellee-Defendant.

No. 49A02-0410-CV-823

Aug. 12, 2005.
Rehearing Denied Oct. 21, 2005.
Transfer Dismissed March 2, 2006.

VAIDIK, Judge.

Case Summary

This is a class action against the Commissioner of the Indiana Bureau of Motor Vehicles brought by three illegal aliens (collectively, "the plaintiffs") who are unable to obtain State of Indiana driver licenses
[1] and/or identification cards from the Bureau of Motor Vehicles ("BMV") because of new identification requirements, which were enacted in 2002 without promulgation. The trial court granted

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[1] The parties refer to them as "driver's licenses." However, Title 9 of the Indiana Code refers to them as "driver licenses" or "driving licenses." Accordingly, we choose to use the term "driver licenses."

summary judgment in favor of the BMV. Specifically, the trial court found that the plaintiffs lacked standing, that it did not have the power to review the BMV's identification requirements, and that there was no merit to the plaintiffs' constitutional challenge to the requirements. We conclude that the plaintiffs have standing to challenge the new identification requirements. In addition, we conclude that the identification requirements constitute an administrative rule, which was not promulgated pursuant to the Indiana Administrative Rules and Procedures Act ("ARPA"), Indiana Code § 4-22-2*et seq.* Because the requirements were not promulgated in accordance with the ARPA, they are void and without effect. We therefore reverse the trial court.[2]

Facts and Procedural History

On Friday, July 12, 2002, the BMV announced that effective Monday, July 15, 2002, applicants for Indiana driver licenses, permits, and identification cards would have to present certain documentation proving their identity before obtaining such cards.[3]

The new identification requirements are vastly different from the previous ones.[4] The BMV

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[2] We held oral argument in the Court of Appeals' courtroom on July 27, 2005. We commend counsel for their excellent presentations.

[3] The requirements have been modified several times since this initial date; however, they have not been modified since November 2003.

[4] Before July 15, 2002, applicants for Indiana driver licenses, permits, and identification cards had to amass six points by

decided to tighten its requirements because of recent increases in identity fraud. *See* Appellants' App. p. 81-82. The BMV announced its change in the identification requirements by press conference and by publication. Before the BMV's announcement of this change, there was no promulgation pursuant to the ARPA.

Currently, all new issuances for Indiana driver licenses, permits, and identification cards require applicants to present the following documentation:

- One Primary Document
- One Proof of Social Security Number [5]
- One Secondary Document
- One Proof of Indiana Residency Document
- A Primary or Secondary Document may also meet the Indiana residency requirement as long as the applicant's name and correct address are shown on the document

OR

- Two Primary Documents
- One Proof of Social Security Number

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producing various types of documents. *See* Appellants' App. p. 97 (listing documents and corresponding point values).

[5] Applicants for identification cards are not required to present social security documentation.

- One Proof of Indiana Residency Document [6]

Primary documents include the following:

United States Birth Certificate with stamp or seal issued from:

- County Department or County Board of Health Vital Records/Statistics Division from the applicant's state of birth

- State Department or State Board of Health Vital Records/Statistics Division from the applicant's state of birth

- United States State Department

- United States Territories-American Samoa, Guam, Puerto Rico, and Virgin Islands

Certification of Report of Birth DS-1350

United States Consular Report of Birth FS-240

United States Certificate of Naturalization/Citizenship

Valid United States Military/Merchant Marine Photo ID

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[6] We note that the identification requirements are less stringent for Renewals/Amendments and Duplicates. *See id.* at 387-88.

Valid United States Passport

Acceptable INS[7] Documentation:

- Valid foreign passport with a Visa that includes a valid I-94 in the passport indicating the duration of stay in the United States
- Employment Authorization Card I-688B
- Employment Authorization Card I-766
- I-94 Stamped with "Section 207" Refugee Status
- I-94 Stamped with "Section 208" Asylum Status
- Permanent Resident Card I-551
- Temporary I-551 stamp
- Temporary Resident Card I-688
- Re-Entry Permit I-327
- Refugee Travel Document I-571
- Other INS documentation subject to BMV Driver Services approval

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[7] As of March 1, 2003, the INS (Immigration and Naturalization Service) transitioned into the Department of Homeland Security as the United States Citizenship and Immigration Services. Nevertheless, we use INS throughout this opinion.

Secondary Documents include the following:

- Bank Statement
- Certified Academic Transcript
- Confirmation of Registration Letter from an Educational Institution
- Court documentation with stamp or seal in applicant's name
- Foreign Consulate-Issued ID Card
- Government-Issued License or ID Card
- Hoosier RX Plan Card with imprinted name
- Indiana County Pre-sentence Investigation Report with clerk stamp or seal
- Indiana Gun Permit (Valid)
- Indiana Probation Photo ID Card
- Indiana Professional/Occupational license (Valid)
- Indiana BMV Title Application with BMV Valid Stamp
- Indiana BMV Title or Registration (Valid)
- Insurance Card

• Letter from Probation Officer or county caseworker on letterhead stationary, certified with court or county stamp or seal with the applicant's name, and signature of the probation officer

• Major Credit or Bank Card (MC, Visa, AE, and Discover ONLY) (Valid)

• Original Out-of-State Driver Record

• Out-of-State Driver License, Identification Card or Permit with photograph

• Pay Check Stub-computer generated

• Prison Release Documentation/Photo ID

• School Report Card (dated within 12 months)

• School Photo ID Card

• Selective Service Acknowledgement Card-SSS Form 3A

• United States Divorce Decree certified by court of law with stamp or seal

• United States Application of Marriage/Record of Marriage (Certified Copy). Must contain the stamped seal and be signed by the Clerk.

• United States District Court Pre-sentence

Investigation Report with clerk stamp or seal

• United States Military Discharge or DD214 Separation papers

• United States Veterans Universal Access ID card with photo

• W-2 Form (Federal or State) or 1099 Federal tax form

See id. at 387-89.

The plaintiffs in this case, all illegal aliens, filed a complaint for declaratory and injunctive relief against the Commissioner of the BMV alleging that the new identification requirements have prevented them from obtaining Indiana driver licenses and/or identification cards. Specifically, the complaint alleges:

> This is a class action complaint challenging the defendant's new rule for obtaining driver's licenses, learner's permits, and state identification in Indiana. In contrast to earlier practice which properly interpreted Indiana law as only requiring applicants to demonstrate their identity, the new rule, which has been implemented without notice or rule-making, requires applicants to, among other things, demonstrate that they possess a valid United States passport or acceptable documentation from the Immigration and Naturalization Service (hereinafter "INS"), regardless of proof of identity.

> The rule, which makes it impossible for certain persons to obtain a license, permit or state identification, regardless of proof of identity, is both unconstitutional and unlawful.

Appellants' Br. p. 46.

The facts surrounding the individual plaintiffs are as follows. Miguel Villegas entered the United States without documentation. He does not have a social security number. He had an Indiana identification card, but it expired. He also wants a driver license. "Betty Doe"[8] entered the United States without inspection and documentation. She does not have a social security number. Betty Doe had an Indiana driver license, but it was stolen. She requests that her driver license be reissued. Likewise, "Mary Smith"[9] entered the United States without inspection and documentation and does not have a social security number. Her goal is to obtain an identification card and ultimately a driver license.

The complaint was filed in August 2002-approximately one month after the new identification requirements went into effect-but has been twice amended, the last time in June 2003. The plaintiffs also filed a motion for class certification. In March 2004, the plaintiffs filed a motion for summary judgment, and the BMV responded by filing a cross-motion for summary judgment. Following a hearing, the trial court

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[8] "Betty Doe" is an anonymous name.

[9] "Mary Smith" is an anonymous name.

issued Findings of Fact, Conclusions of Law and Judgment in September 2004. Specifically, the trial court concluded that the plaintiffs were not eligible for driver licenses and therefore there was "no standing." Appellants' App. p. 16. The trial court also concluded that it did not have the power to review the BMV's identification requirements and that there was no merit to the plaintiffs' constitutional arguments. As a result, the trial court held that the "plaintiffs shall take nothing by way of their complaint, and this case be, and is hereby, dismissed." *Id.* at 17. In addition, the trial court granted the plaintiffs' motion for class certification in a nunc pro tunc order. In that order, the trial court defined the class as follows:

> [A]ll current and future persons in Indiana who are, or who will be, required by defendant to produce information concerning their citizenship or immigration status in order to obtain an Indiana driver's license or permit or a state identification card, but who are, or will be, unable to produce the identification mandated by the Indiana Bureau of Motor Vehicle's non-promulgated identification requirements.

Id. at 393. The plaintiffs now appeal the dismissal of their class action.

Discussion

The plaintiffs contend that the trial court erred in granting summary judgment in favor of the BMV. When reviewing a grant or denial of

summary judgment, our standard of review is the same as that used in the trial court: summary judgment is appropriate only where the evidence shows there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); *Embry v. O'Bannon*, 798 N.E.2d 157, 159 (Ind.2003). Where the dispute is one of law rather than fact, our standard of review is de novo. *Embry*, 798 N.E.2d at 159.

I. Standing

The plaintiffs first argue that the trial court erred in concluding that there was no standing. Standing refers to the question of whether a party has an actual demonstrable injury for purposes of a lawsuit. *Patterson v. Seavoy*, 822 N.E.2d 206, 210 (Ind.Ct.App.2005). To establish standing, a plaintiff must demonstrate a personal stake in the outcome of the lawsuit and that the injury is a result of the defendant's conduct. *Alexander v. PSB Lending Corp.*, 800 N.E.2d 984, 991 (Ind.Ct.App.2003), *trans. denied.* In a class action, each named plaintiff must have standing. *See id.* at 992 ("[E]ven named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other unidentified members of the class to which they belong and purport to represent.") (quotation omitted). We divide our discussion of standing into two subsections: driver licenses and identification cards.

A. Driver Licenses

The record shows that each of the plaintiffs desires an Indiana driver license. The trial court concluded that Villegas does not have standing because he "is not eligible for an Indiana driver's license because he is currently suspended.... This failure to be currently eligible ... demonstrates that the plaintiff cannot demonstrate the requisite injury [.]" Appellants' App. p. 15. The trial court appears to have concluded that Betty Doe and Mary Smith do not have standing because they do not have "a valid social security card." *Id.* We note, however, that Villegas also does not have a social security card. The BMV argues on appeal that the trial court "correctly determined that the named plaintiffs did not have standing to challenge [the] BMV's identification requirements for applicants for driver licenses" because Indiana Code § 9-24-9-2 "requires that applicants for driver's licenses provide a social security number on the application, and the named plaintiffs did not have social security numbers." Appellee's Br. p. 10. Accordingly, the BMV's argument continues, since the plaintiffs cannot obtain driver licenses because they do not have social security numbers, then they are not injured by the new identification requirements. In other words, the BMV argues that it is not the new identification requirements that preclude the plaintiffs from receiving a driver license but rather state statute requiring a social security number that precludes them from receiving a driver license.

Indiana Code § 9-24-9-2 provides in pertinent part:

> Each application for a license or permit under this chapter must require the following information:
>
> (1) The name, date of birth, sex, *Social Security number,* and mailing address and, if different from the mailing address, the residence address of the applicant. The applicant shall indicate to the bureau which address the license or permit shall contain.

(emphasis added).

The BMV asserts that because Indiana Code § 9-24-9-2 requires applications for driver licenses and permits to contain social security numbers, if the application does not contain a social security number, then that applicant cannot obtain a driver license or permit. This ignores the fact that if an applicant has never been issued a social security number, the BMV allows that applicant to fill out a BMV Social Security Affidavit, which is "only to be used by an applicant who is attesting that they have never been issued a Social Security Number."[10] Apellants' App. p. 390 (emphasis in

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[10] The BMV makes a rather strange argument on appeal. Specifically, it argues that its *own* policy of allowing applicants who have never been issued social security numbers to fill out an affidavit to that effect should not "override state law" requirements of including social security numbers on driver license applications. Appellee's Br. p. 18. To this day, the BMV's website provides, "If the applicant

original). After filling out the affidavit, the applicant may receive a driver license despite not having a social security number. The person designated to speak for the BMV at the deposition in this case, Karen Cothron, confirmed that this special procedure exists. *See id.* at 82. Because a special procedure exists for applicants who have never been issued social security numbers to obtain driver licenses, the fact that the plaintiffs do not have social security numbers does not preclude them from receiving Indiana driver licenses. The plaintiffs are unable to obtain driver licenses because of the new identification requirements; therefore, they have suffered concrete and direct injury because of the identification requirements and have standing to challenge these requirements. Accordingly, the trial court erroneously determined that there was no standing based on the fact that none of the plaintiffs have social security numbers.[11]

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does not have a Social Security Number, the applicant must complete the BMV Social Security Affidavit." *See Indiana Bureau of Motor Vehicles Identification Documentation List and Instructions, available at* http://www.in.gov/bmv/driverlicense/idreq.html (last accessed Aug. 2, 2005). This weighs strongly against the BMV's argument on appeal that a social security number is required to obtain Indiana driver licenses. We also note that an administrative agency's interpretation of a statute it is charged with enforcing is given considerable deference. *See Indiana-Kentucky Elec. Corp. v. Comm'r, Ind. Dep't of Envtl. Mgmt.*, 820 N.E.2d 771, 775 (Ind.Ct.App.2005).

[11] On May 11, 2005, President Bush signed into law H.R. 1268. Title II of H.R. 1268 is titled Improved Security for Drivers' Licenses and Personal Identification Cards. Pursuant to this new law, the federal government-beginning three

As for the fact that Villegas's driver license is currently suspended, which arguably impacts whether he is in *immediate* danger of suffering an injury because he cannot now obtain a driver license, *see Area Plan Comm'n, Evansville-Vanderburgh County v. Hatfield*, 820 N.E.2d 696, 699 (Ind.Ct.App.2005), *trans. denied*, we note that Villegas also desires an identification card. Therefore, even if Villegas does not have standing regarding a driver license, as explained more fully below, he has standing to challenge the identification requirements for an identification card. In any event, Smith and Doe have standing to challenge the identification requirements for driver licenses.

B. Identification Cards

The record shows that Villegas and Smith also

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years after enactment-may not accept for any official purpose a driver's license or identification card issued by a state to any person unless the state meets certain requirements. The requirements include, among others: (1) "Proof of the person's social security account number or verification that the person is not eligible for a social security account number;" and (2) "evidence of lawful status." Appellants' Add. p. 2. In addition, H.R. 1268 provides that no later than September 11, 2005, participating states are to enter into a memorandum of understanding with the Secretary of Homeland Security to use an automated system set up by the federal government "to verify the legal presence status of a person, other than a United States citizen, applying for a driver's license or identification card." *Id.* at 3. This new federal law has no impact on the BMV's current system, although it may impact future changes.

desire to obtain Indiana identification cards. The BMV asserts on appeal that the "Marion Superior Court did not address the question whether the Plaintiffs had standing to challenge the BMV's identification requirements relating to identification cards." Appellee's Br. p. 21. Accordingly, the BMV asks us to remand the case to the trial court for resolution of this issue because otherwise we would be rendering an advisory opinion. *See Richardson v. Calderon,* 713 N.E.2d 856, 863 (Ind.Ct.App.1999) ("Generally, we will consider only those issues which were briefed and argued by the parties before the trial court and which the trial court considered and ruled upon."), *trans. denied.* Despite the BMV's request for us to remand the case, we note that the issue of identification cards was before the trial court. Additionally, the trial court addressed the merits of the plaintiffs' complaint.

We note that there is no requirement that applicants present a social security number before obtaining identification cards. *See* Ind.Code §§ 9-24-16-1,-2; *see also* Appellants' App. p. 99, 387. Cothron, the BMV representative in this case, admitted as much during her deposition. *See* Appellants' App. p. 82-83. Therefore, the trial court's rationale in concluding that there was no standing regarding driver licenses simply does not apply to identification cards. Because Villegas and Smith have been precluded from obtaining identification cards, they have demonstrated an actual injury and therefore have standing to challenge the identification requirements for such

cards.

C. Unclean Hands

The trial court also found that Doe and Smith had "unclean hands" and therefore could not challenge the new identification requirements because they "intentionally relied on a false social security number when attempting to establish an identity."[12] *Id.* at 16. The principle of unclean hands is that "he who comes into equity must come with clean hands." *Wedgewood Cmty. Ass'n v. Nash*, 781 N.E.2d 1172, 1178 (Ind.Ct.App.2003) (quotation omitted), *clarified on reh'g*, 789 N.E.2d 495 (Ind.Ct.App.2003), *trans. denied.* The doctrine of unclean hands is not favored and must be applied with reluctance and scrutiny. *Id.* For this doctrine to apply, the misconduct must be intentional, and the wrong that is ordinarily invoked to defeat a claimant by using the unclean hands doctrine must have an "immediate and necessary relation" to the matter before the court. *Id.* (quotation omitted).

Even assuming that Doe and Smith used false social security numbers when attempting to establish their identity, which they contest on appeal, they are not being denied driver licenses and/or identification cards because of that fact. A

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[12] The record shows that during her deposition, Smith, upon the advice of her attorney, took the Fifth Amendment when asked if she had used a false social security number on an employment application. The record also shows that Doe's BMV record contains a false social security number.

social security number is not required to obtain an identification card, and a special procedure exists to obtain a driver license when an applicant has not been issued a social security number. Rather, Doe and Smith are unable to obtain driver licenses and/or identification cards because of the new identification requirements. Therefore, Doe and Smith's alleged wrong does not have an "immediate and necessary relation" to the matter before the court; the clean hands doctrine does not bar their challenge.

Because each of the named plaintiffs has standing, we now proceed to the merits of the class action.

II. The Merits of the Class Action

On appeal, the State does not address the merits of the plaintiffs' complaint. Rather, the State asserts:

> The trial court did not decide any of the questions raised by the Plaintiffs concerning the merits of their challenge to the documentation procedures used by BMV to ensure identity. The trial court simply decided that the Plaintiffs did not have standing and that the court did not have jurisdiction. ... Accordingly, the Commissioner of the BMV does not address the arguments advanced by the Plaintiffs on the merits in this brief.

Appellee's Br. p. 23. We find the State's position on this point to be unfounded. The trial court issued

the following relevant Findings of Fact and Conclusions of Law:

3. Although the public was notified of the BMV's identification requirements, no formal notice of public hearing or promulgation pursuant to Ind.Code § 4-22-2 took place.

* * * * *

7. In addition to protecting the public highways from incompetent drivers, the State also has a legitimate interest in not allowing its governmental machinery to be a facilitator for the concealment of illegal aliens. The interest is one that weighs heavily on the Courts due to their role in the administration of the nation's legal system.

8. Illegal aliens, such as plaintiffs, are not a suspect class implicating constitutional scrutiny under the complementary equal protection clause of the United States Constitution and privileges and immunities clause of the Indiana Constitution. Illegal, or undocumented, aliens do not have the immutable characteristic of a truly suspect class because their status is the product of conscious, indeed, unlawful action.

9. The plaintiffs cannot demonstrate any injury recognized by the abovesaid Constitutional provisions based on their illegal status in this country.

* * * * *

11. For further grounds, if the Court would invalidate the identification requirements for applications for driving licenses, it would have no conclusive effect on the BMV's administration of the application process. Ind.Code § 9-24-11-2 directs the Bureau to be "prudent" when issuing licenses.

12. Being prudent in the issuance of licenses is a power bestowed on the BMV by statute and is incapable of being reviewed by this Court due to its discretionary characteristic.

Appellants' App. p. 10, 16-17. We find that these findings of fact and conclusions of law indicate that the trial court addressed more than mere standing and indeed reached the merits of the plaintiffs' complaint. We therefore proceed to the merits.

The plaintiffs argue that the new identification requirements represent an administrative "rule," which should have been promulgated pursuant to the ARPA. *See generally Indianapolis Downs LLC v. Ind. Horse Racing Comm'n*, 827 N.E.2d 162 (Ind.Ct.App.2005) (distinguishing the ARPA, which governs administrative rules, from the Indiana Administrative Orders and Procedures Act ("AOPA"), which governs administrative orders). "[A]dministrative agencies may make reasonable rules and regulations to apply and enforce legislative enactments." *Indiana-Kentucky Elec. Corp. v. Comm'r, Ind. Dep't of Envtl. Mgmt.*, 829

N.E.2d 771, 779-80 (Ind.Ct.App.2005); *see also Ind. Dep't of Envtl. Mgmt. v. Twin Eagle LLC,* 798 N.E.2d 839, 847 (Ind.2003). The legislative enactment here is Indiana Code § 9-24-11-2, which provides that the BMV "may issue all permits and licenses required by law for the operation of a motor vehicle in a manner the bureau considers necessary and prudent."

However, an administrative agency may only regulate by a new rule if the proper rulemaking procedures have been followed. *Twin Eagle LLC,* 798 N.E.2d at 847; *Indiana-Kentucky Elec. Corp.,* 820 N.E.2d at 780. Thus, in establishing new rules, an administrative agency must comply with the ARPA, which includes provisions for public hearings and review by executive branch officials.[13] *Twin Eagle LLC,* 798 N.E.2d at 847-48; *Indiana-Kentucky Elec. Corp.,* 820 N.E.2d at 780. On the other hand, agency actions that result in resolutions or directives that relate to internal policy, procedure, or organization and do not have the effect of law are not subject to the same requirements. *Twin Eagle LLC,* 798 N.E.2d at 848; *Indiana-Kentucky Elec. Corp.,* 820 N.E.2d at 780;

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[13] Specifically, the ARPA's provisions include, among others: (1) publishing notice of intent to adopt rule (Ind.Code § 4-22-2-23); (2) publishing notice of hearing (Ind.Code § 4-22-2-24); (3) conducting public hearing and allowing comments (Ind.Code § 4-22-2-26); (4) formally adopting the rule (Ind.Code § 4-22-2-29); (5) obtaining approval from the Attorney General (Ind.Code §§ 4-22-2-31, -32); (6) obtaining approval from the Governor (Ind.Code §§ 4-22-2-33, -34); and (7) submitting the rule to the Secretary of State for filing (Ind.Code § 4-22-2-35).

see also Ind. Code § 4-22-2-13(c)(1) ("This chapter does not apply to a rulemaking action that results in any of the following rules: (1) A resolution or directive of any agency that relates *solely* to internal policy, internal agency organization, or internal procedure and does not have the effect of law.") (emphasis added).

In sum, an administrative agency must comply with the rulemaking procedures outlined in the ARPA only if they are promulgating a rule. Therefore, we must determine whether the BMV's new identification requirements constitute a rule. Indiana Code § 4-22-2-3(b) defines a "rule" as:

> [T]he whole or any part of an agency statement of general applicability that:
>
> (1) has or is designed to have the effect of law; and
>
> (2) implements, interprets, or prescribes:
>
> (A) law or policy; or
>
> (B) the organization, procedure, or practice requirements of an agency.

Characteristics of a rule were enunciated in *Blinzinger v. Americana Healthcare Corp.*, 466 N.E.2d 1371 (Ind.Ct.App.1984). In *Blinzinger*, we found that a rate fee directive adopted by the Indiana Department of Public Welfare was a rule because: (1) it was an agency statement of general

applicability to a class; (2) it was applied prospectively to the class; (3) it was applied as though it had the effect of law; and (4) it affected the substantive rights of the class. *Id.* at 1375.

The identification requirements here indeed constitute a rule. They are agency statements of general applicability that are designed to have the effect of law and implement the BMV's policy of tightening the requirements to obtain new issuances of Indiana driver licenses, permits, and identification cards.[14] The requirements are designed to have the effect of law because if an applicant does not produce the necessary documentation, then he or she cannot obtain a driver license, permit, or identification card. The requirements apply prospectively to all applicants seeking new issuances of driver licenses, permits,

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[14] For instance, the BMV's website provides:

> For many individuals, a Driver License or Identification Card issued by the Indiana Bureau of Motor Vehicles (BMV) is the most important means of proving their identity. The Bureau of Motor Vehicles endeavors to safeguard the integrity of driver documents and to protect the public from false and/or fraudulent applications. In accordance with Indiana Code [§] 9-24-18-2, making a false or fraudulent application is a criminal offense punishable by imprisonment, fine and license suspension.

See Indiana Bureau of Motor Vehicles Identification Documentation List and Instructions, available at http://www.in.gov/bmv /driverlicense/ idreq.html (last accessed Aug. 2, 2005).

and identification cards as of a certain date. In fact, the record shows that an applicant who was able to obtain a driver license before July 15, 2002, was not able to obtain a license once the new identification requirements went into effect. Additionally, the requirements implement the BMV's policy of trying to prevent identity fraud.

The new identification requirements do not relate primarily to the BMV's internal policies, procedures, or organization. The primary impact of the identification requirements is external, and it is the primary impact that is paramount. *See Ind. Dep't of Envtl. Mgmt. v. AMAX, Inc.*, 529 N.E.2d 1209, 1213 (Ind.Ct.App.1988). For example, in *Conquest v. State Employee's Appeals Commission*, 565 N.E.2d 1086, 1088 (Ind.Ct.App.1991), *trans. denied*, the trial court found, and this Court agreed, that the Indiana Department of Correction's policy concerning parole officers' home visits with parolees affected primarily the parole officers' work hours and therefore was an internal policy, not a rule. In contrast, here it is clear that the identification requirements primarily impact applicants seeking new issuances of driver licenses, permits, and identification cards because it sets forth what is essential for them to obtain such cards.

We finally note the trial court's determination that even if it were to invalidate the identification requirements, the result would be the same. The trial court reasoned that Indiana Code § 9-24-11-2 directs the BMV to issue licenses in a manner the

Bureau considers necessary and prudent and that such prudence is incapable of judicial review. Thus, if the rule were improperly promulgated, then there would be no harm because the courts could not review the rule the Bureau enacted anyway. We do not agree for two reasons. First, the rules implemented by the BMV are always judicially reviewable for constitutional implications.[15] Second, the ARPA requires rules to be adopted in accordance with the requirements of Indiana Code chapter 4-22-2. *See* Ind. Code § 9-15-2-1(3). These requirements dictate, among other things, public input into any proposed rule changes. The duty of the BMV to issue licenses in a manner that it deems prudent does not supersede the mandate to allow the public to participate in the rule-making process.

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[15] The plaintiffs argue that even if the BMV had properly promulgated the rule, it would nevertheless be invalid because it exceeds statutory authority. The plaintiffs-citing various statutory citations-assert that no statute in Title 9 requires applicants to present either a United States birth certificate or documentation of the applicant's immigration status; therefore, the BMV's rule cannot require such documentation. Because the BMV did not properly promulgate the rule, we do not reach this issue.

In addition, the plaintiffs argue that the new identification requirements violate the Due Process Clause, the Equal Protection Clause, and the Supremacy Clause of the United States Constitution. Because the requirements are void and without effect, we do not address these constitutional arguments. To do so would be to render an advisory opinion. We have no way of knowing whether the BMV in the future will promulgate the same identification requirements or different ones.

We hold that the new identification requirements are a rule, and because they were not promulgated in accordance with the ARPA, they are void and without effect. *See Indiana-Kentucky Elec. Corp.*, 820 N.E.2d at 781; *Blinzinger*, 466 N.E.2d at 1375. The trial court erred by entering summary judgment in favor of the BMV. We therefore remand this case with instructions for the trial court to enter summary judgment in favor of the plaintiffs.

Reversed and remanded with instructions.

MAY, J., and BARNES, J., concur.

State of Indiana)
)ss:
County of Marion)

In the Marion Superior Court
Room No. 3
Cause No. 49D03-0208-PL-1448

MIGUEL VILLEGAS, BETTY DOE, MARY SMITH, on their own behalf and on behalf of a class of similary situated,

Plaintiffs,

v.

MARY DEPREZ, in her official capacity as Commissioner of the Indiana Bureau of Motor Vehicles,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

This cause was argued on Plaintiff's motion for summary judgment and defendant's response on June 9, 2004. Kenneth Falk, Attorney at Law, represented plaintiffs; and Michael T. Schaefer, Deputy Attorney General, represented defendant. The Court having considered the parties' written submissions and having received oral argument, now makes the following findings and conclusions.

1. In the 2003, the Bureau of Motor Vehicles ("BMV") announced that applicants for driver's licenses and identification cards would be required to present certain documents to establish that the applicants were who they say they were. Exhibit G, Deposition of Karen Cothron, p. 27; *see also*, *Id.*, p. 5.

2. This announcement was made by publication and inclusion on the BMV website. The announcements (Exhibit F, Cothron depositions Exhibits 1-9) published by the Bureau listing various documents that are deemed sufficient to establish identity of the applicant made no changes in the statutory requirements for driving licenses.

3. Although the public was notified of the BMV's identification requirements, no formal notice of public hearing or promulgation pursuant to Ind. Code § 4-22-2 took place.

4. Prior to this announcement, the BMV experienced widespread attempts by non-residents to obtain Indiana Driver's Licenses; in one incident, an entire busload of non-residents arrived at a branch to apply for driver's licenses. Exhbit G, Deposition of Karen Cothron, p. 10.

5. An official government issued Driver's License has become a necessary fixture in the commercial world for various activities, including cashing checks, job applications, and purchasing airline tickets.

6. The media has reported the pervasiveness of identity theft. Exhibit K.

7. Ind. Code § 9-24-9-2 requires certain information in the application: the applicant's name, age, sex address, Social Security number,

any previous licensure in another state, whether the previous license was ever suspended, and any mental or physical disability.

8. New applicants for Indiana Driver's licenses now must establish their identity by presenting the following documents:

- One (1) Primary Document
- One (1) Proof of Social Security Number (SSN)
- One (1) Secondary Document
- One (1) Proof of Indiana Residency Document
- A Primary or Secondary Document may also meet the Indiana residency requirement as long as the applicant's name and correct address are shown on the document

OR

- Tow (2) Primary Documents
- One (1) Proof of Social Security Number *
- One (1) Proof of Indiana Residency Document

Primary documents are the following:

United States Birth Certificate with stamp or seal issued from:

- County Department or County Board of Health Vital Records/Statistics Division from the applicant's State of birth.

- State Department or State Board of Health Vital Records/Statistics Division from the applicant's State of birth.
- U.S. State Department
- United States Territories – American Somoa, Guam, Puerto Rico, and Virgin Islands (translation may be required)

Valid U.S. Military/Merchant Marine Photo ID

Valid U.S. Passport

Acceptable INS Documentation

- Valid foreign passport with a Visa that includes a valid I-94 in the passport indicating the duration of the stay in the U.S. (Canadian passports are not required to have a Visa when entering the U.S. and are exempt from this requirement)
- Certificate of Naturalization/Citizenship
- Employment Authorization Card I-688B
- Employment Authorization Card I-766
- I-94 Stamped with "Section 207" Refugee Status
- I-94 Stamped with "Section 208" Asylum Status
- Permanent Resident Card I-551
- Temporary I-551 Stamp
- Temporary Resident card I-688
- Re-Entry Permit I-327
- Refugee Travel Document I-571

- Other INS documentation subject to BMV Driver Services Approval

Secondary Documents are the following:

Must present one (1) document
In addition, any document from the list of Primary documentation may be used as a Secondary document.

- Certified Academic Transcript
- Confirmation of Registration Letter from an Educational Institute
- Court documentation with stamp or seal in applicant's name
- Foreign Consulate-Issued ID card
- Government-Issued License or ID Card
- Hoosier RX Plan Card
- Indiana County Pre-sentence Investigation Report with clerk stamp or seal
- Indiana Gun Permit (Valid)
- Indiana Probation Photo ID Card
- Indiana Professional/Occupational license (Valid)
- Indiana BMV Title Application w/ BMV Valid Stamp
- Indiana BMV Title or Registration (Valid)
- ITIN Card/Letter
- Letter from Probation Officer on letterhead stationary, certified with stamp or seal with the applicant's name, and signature of the probation officer

- Major Credit or Bank Card (MC, VISA, AE, or Discovery ONLY) (Valid)
- Medicare, Medicaid or Hoosier Works Card
- Original Out-of-State Driving Record
- Out-of-State Driving Record
- Out-of-State Driver License, Identification Card or Permit with photograph
- Pay Check Stub-Computer generate with name and SSN
- Prison Release Documentation/Photo ID
- School Report Card (dated within 12 mos.)
- U.S. Divorce Decree certified by court of law with stamp or seal
- U.S. Application of Marriage/Record of Marriage (Certified copy). Must contain the stamped seal and be signed by the Clerk.
- U.S. District Court Pre-Sentence Investigation Report with clerk stamp or seal
- U.S. Military Discharge or DD214 Separation papers
- U.S. Veterans Universal Access ID card with photo
- W-2 Form (Federal or State) or 1099 Federal tax form

9. Ind. Coded § 9-24-3-1 directs the Bureau to issue a driver's license to an individual who meets the age requirements, who has made proper

application on the Bureau's form, has passed the examination and test, and paid the required fee.

10. There is no statute that specifically states that an applicant must actually be the person licensed, but Ind. Code § 9-24-11-2 provides:

> The Bureau may issue all permits and licenses required by law for the operation of a motor vehicle in a manner the Bureau considers necessary and prudent.

11. An applicant for license must also submit the social security number assigned to the applicant as required of the States by 42 U.S.C. § 666(a)(13). Indiana met this requirement by amending Ind. Code § 9-24-9-2 (Burns. 2003 Cum.Suppl.).

12. In cases where a license is "lost or destroyed" the individual to whom a license was issued may obtain a replacement upon "proof satisfactory to the bureau" that is was indeed lost or destroyed and pays the required fee. Indiana Code § 9-24-14-1.

13. Indiana Code § 9-25-4-1 states that no person may register a motor vehicle or operate one on a public highway in Indiana unless financial responsibility is in effect with respect to the motor vehicle. Minimum financial responsibility requires amounts of $25,000 for bodily injury or death of one individual, $50,000 for two more individuals in one accident, and $10,000 for property damage. Id. Upon receiving a traffic accident report, Indiana Code § 9-25-5-2 requires the Bureau to contact each person identified in the accident report to file proof of financial responsibility; the request must be mailed by first class mail to the address of the

individual as it appears on the records of the Bureau. IC § 9-25-5-3(b). A driver's failure to file the report results in the suspension of driving privileges. IC § 9-25-5-1.

14. The current plaintiffs in this case have alleged that the new BMV identification requirements prevent them from obtaining Indiana driver's licenses.

15. Each plaintiff is an illegal alien. Third Amended Complaint, ¶¶ 33, 39, 45.

16. "Mary Smith" entered the United States from Mexico at Mexicali under another person's identity card. Deposition of Mary Smith, p. 27.

17. "Betty Doe" bypassed a border control crossing and entered the United States in Arizona. Deposition of Betty Doe, p.31.

18. The circumstance of Miguel Villegas' entry into the United States is unclear, but he also entered the United States illegally. Third Amended Complaint, ¶ 33.

19. Villegas and Betty Doe have been or are now licensed by the State of Indiana to drive an automobile. Villegas is a suspended driver. Exhibit A, Certified copy of Driving Record. Villegas also has the luxury of two driving records under different license numbers. Certified copy of Driving Record, Exhibit C.

20. Betty Doe lost her driving license, but has a photocopy. Deposition of Betty Doe, p. 17.

21. None of the plaintiffs has a social security card issued by the Social Security Administration. Deposition of Betty Doe, p. 26, 27. Although Betty Doe supplied a social security number on employment documents and her driver's license

application, she has stated under oath that she does not have a social security number. Id., p. 29 and Deposition Exhibit D. betty Doe, however, has submitted a social security number registered to two other persons, one of which is ten years older than her. Affidavit and attachment of Michael Ward, Exhibit E. Villegas does not have a social security card. Third Amended Complaint, ¶ 37.

22. Mary Smith has never had a number issued to her by the Social Security Administration. Deposition of Mary Smith, p.22; upon advice of counsel, she declined to state whether she had ever given a social security number to an employer. Id., p.18.

23. None of the plaintiffs has ever been licensed to drive an automobile by another jurisdiction. Deposition of Mary Smith, p. 16; Deposition of Betty Doe, p. 7. Villegas' driving record indicates no previous licensure. Exhibit A & C.

24. Betty Doe does not carry auto insurance. Deposition of Betty Doe, p.22. Miguel Villegas has had his license suspended for failure to file proof of financial responsibility and is currently suspended for another reason Exhibit A and C. Mary Smith does not own an automobile. Deposition of Mary Smith, p. 22.

25. All of the plaintiffs have been present in the State of Indiana longer than 60 days. Betty Doe has lived in Indiana for four years, as of the date of her deposition. Deposition of Betty Doe, p. 6. Mary Smith has lived at an address in Indianapolis since September 2000. Deposition of Mary Smith, p. 20. Villegas has been present in Indiana since at

least 2002 when he applied for a learner's permit. Third Amended Complaint, ¶ 35.

CONCLUSIONS OF LAW

1. When a trial court is confronted with a challenge to its subject matter jurisdiction, it must decided upon the complaint, any affidavits or other evidence submitted whether it possesses the authority to further adjudicate the action.

2. Without a plaintiff with standing to present the claim, the Court is totally without jurisdiction to decide any issue in the cause.

3. Miguel Villegas is not eligible for an Indiana driver's license because he is currently suspended. Exhibit A and C. The failure to be currently eligible for a driver's license, even with identification, demonstrates that the plaintiff cannot demonstrate the requisite injury to present a justiciable controversy before the court.

4. Neither Betty Doe nor Mary Smith has a valid social security card and are unable to affirm under oath that either of them has never had one issued to them.

5. To obtain an injunction against the Bureau, the applicant must come to the court with clean hands. For the doctrine of unclean hands to apply, the misconduct must be intentional, and the wrong that is ordinarily invoked to defeat a claimant must have an immediate and necessary relation to the matter before the court.

6. Doe and Smith intentionally relied on a false social security number when attempting to establish an identity. In Betty Doe's case, she also

used a false address when applying for the Matricular Consular identification card issued by the local Mexican consul. Deposition of Betty Doe, p. 14, 15.

7. In addition to protecting the public highways from incompetent drivers, the State also has a legitimate interest in not allowing its governmental machinery to be a facilitator for the concealment of illegal aliens. This interest is one that weighs heavily on the Courts due to their role in the administration of the nation's legal system.

8. Illegal aliens, such as plaintiffs, are not a suspect class implicating constitutional scrutiny under the complementary equal protection clause of the United States Constitution and privileges and immunities clause of the Indiana Constitution. Illegal, or undocumented, aliens do not have an immutable characteristic of a truly suspect class because their status is the product of conscious, indeed, unlawful action.

9. The plaintiffs cannot demonstrate any injury recognized by the abovesaid Constitutional provisions based on their illegal status in this country.

10. Where there is no recognized injury, there is no standing and that denies subject matter jurisdiction in this Court; in such a situation, the Court can go no further than to deny relief and dismiss the action.

11. For further grounds, if the Court would invalidate the identification requirements for applications for driving licenses, it would have no conclusive effect on the BMV's administration of the application process. Ind. Code § 9-24-11-2

directs the Bureau to be "prudent" when issuing licenses.

12. Being prudent in the issuance of licenses is a power bestowed upon the BMV by statute and is incapable of being reviewed by this Court due to its discretionary characteristic.

IT IS THEREFORE ORDERED that plaintiffs shall take nothing by way of their complaint, and this case be, and is hereby, dismissed.

ALL OF WHICH IS ORDERED, ADJUDGED AND DECREED THIS 3RD DAY OF SEPTEMBER, 2004.

by \s\ Patrick L. McCarty
Patrick L. McCarty, Judge
Marion Superior Court'
Civil Division, Room 3

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State of Indiana)
)ss:
County of Marion)

In the Marion Superior Court
Room No. 3
Cause No. 49D03-0208-PL-1448

MIGUEL VILLEGAS, BETTY DOE, MARY SMITH, on their own behalf and on behalf of a class of similary situated,

Plaintiffs,

v.

GERALD B. COLEMAN, in his official capacity as Commissioner of the Indiana Bureau of Motor Vehicles,

Defendant

THIRD AMENDED CLASS ACTION COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Introduction

1. This is a class action complaint challenging the defendant's new rule for obtaining driver's licenses, learner's permits, and state identification in Indiana. In contrast to earlier practice which properly interpreted Indiana law as only requiring applicants to demonstrate

their identity, the new rule, which has been implemented without notice or rule-making, requires applicants to, among other things, demonstrate that they possess a valid United States passport or acceptable documentation from the Immigration and Naturalization Service (hereinafter "INS"), regardless of proof of identity. The rule, which makes it impossible for certain persons to obtain a license, permit or state identification, regardless of proof of identity, is both unconstitutional and unlawful. Appropriate declaratory and injunctive relief is requested.

Parties

2. Miguel Villegas is a resident of Camby, Indiana.
3. Betty Doe is a resident of Marion County, Indiana.
4. Mary Smith is a resident of Marion County, Indiana.
5. Gerald B. Coleman is the duly appointed Commissioner of the Indiana Bureau of Motor Vehicles and is sued in his official capacity.

Class action allegations

6. This action is brought by plaintiffs on behalf of a class of those similarly situated pursuant to Rule 23(B)(2) of the Indiana Rules of Trial Procedure. The class is defined as:

> all current and future persons in Indiana who are, or who will be, required by defendant to produce information concerning

their citizenship or immigration status in order to obtain an Indiana driver's license or permit or state identification card, but who are, or will be, unable to produce the identification mandated by the Indiana Bureau's non-promulgated identification requirements.

7. As defined, the class meets all the requirements of Rule 23(A) of the Indiana Rules of Trial Procedure. Specifically,
   a. The class is so numerous that joinder of all members is impracticable.
   b. There are questions of law or fact common to the class, namely whether the defendant's new identification requirements are lawful and constitutional.
   c. The claims of the representative parties are typical of those of the class.
   d. The representative parties are adequate class representatives.

6. The further requirements of Rule 23(B)(2) of the Indiana Rules of Trial Procedure are met here in that, at all times, defendant has acted and refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Legal Background

8. Indiana Law requires that residents who wish to drive a car must have a valid license issued

by the Bureau of Motor Vehicles (hereinafter "BMV"). *See*, IND. CODE §§ 9-24-1-1, 9-24-1-7.

9. A nonresident who does not have a valid operator's license from another country must also obtain a license. IND. CODE § 9-24-1-7.
10. IND. CODE § 9-24-3-1 provides that the BMV shall issue a driver's license to any individual who:

    -satisfies the statutory age requirements
    -makes a proper application to the BMV upon a form prescribed by the BMV
    -passes the examination and tests required by the BMV
    -pays the appropriate fee
11. IND. CODE § 9-24-9-1 states that applications for licenses or permits must be made on a BMV approved form and must include an affidavit where the applicant swears or affirms that the information set out in the application is true.
12. Each application for a license must require, among other things, the following information:
    a. The applicant's name, age, sex, Social Security Number, and address
    b. Whether the applicant has been licensed before or has been a holder of a learner's permit previously
    c. Whether the applicant has ever had a license or permit suspended.
    d. Whether the applicant has ever been convicted of a crime which would be a felony under Indiana's motor vehicle law or been convicted of any other felony while using a motor vehicle.

e. Whether the applicant has a physical or mental disability.

IND. CODE § 9-24-9-2.

13. Federal law specifically authorizes states, in administering their driver's license laws, to "utilize the social security account numbers issued by the Secretary [of Health and Human Services] for the purpose of establishing the identification of individuals affected by such law, and may require any individual who is or appears to be so affected to furnish to such State . . . or any agency thereof having administrative responsibility for the law involved, the social security account number . . . issued to him by the Secretary." 42 U.S.C. § 405(c)(2).
14. Indiana law also provides that the BMV is to issue an identification card to an individual who:
    a. Makes an application
    b. Is an Indiana Resident

IND. CODE § 9-24-16-1.

15. The application for the identification card must be on a form provided by the BMV, which shall include the applicant's address and which must be verified before a person authorized to administer oaths or affirmations. IND. CODE § 9-24-16-2.
16. The identification card is to contain, among other things, the person's name, address, birth date, and distinctive identification number

generated by the BMV or the person's Social Security number, whichever is requested by the person. IND. CODE § 9-24-16-3.

17. The BMV has not promulgated any regulations concerning driver license requirements. *See* 140 IAC Art. 7.

Factual Allegations

18. Prior to July 15, 2002 the BMV required that in order to obtain a license or identification card the applicant had to present satisfactory proof of identity. This could be accomplished by any number of documents either singly or in combination. Each document was assigned a point value and in order to present proof of identity the point value had to equal six points.
19. This former proof of identity requirement is attached hereto as Exhibit A.
20. Persons without valid immigration status could nevertheless receive a license if they had documents that had point values meeting or exceeding six points.
21. Effective July 15, 2002, the BMV changed the former requirement that identity be proven and introduced new requirements which went beyond mere identification and instead required, among other things, that only citizens or persons with certain immigration statuses could apply for a license or identification card. Additionally, for the first time, any person seeking a license or identification had to have a social security number in his or her own name.

22. The July 15, 2002 requirements are attached as Attachment B.
23. The new requirements were imposed without rule-making or the formal promulgation of regulations.
24. On September 16, 2002, defendant announced modifications to the July 15, 2002 requirements which went into effect on September 2002. These modifications, which are still in effect, are attached as Attachment C and are referred to as the "September 30, 2002 Rule."
25. The September 30, 2002 Rule provides that in order to obtain a drivers' license, permit or state identification, the applicant must present:

    -one document designated as a primary document
    -proof of Social Security Number or completion if the Bureau of Motor Vehicles affidavit which states the applicant never has had a Social Security Number
    -one secondary document
    -one proof of Indiana residency document

    OR

    -two primary documents
    -proof of Social Security Number or completion if the Bureau of Motor Vehicles affidavit which states the applicant never has had a Social Security Number
    -one proof of Indiana residency document

26. The September 30, 2002 Rule indicates that "primary documents" include:
    -United States Birth certificates with seal

-Valid United States passport
-Acceptable documentation from the INS. The rule provides a specific listing of INS documents. It also provides a catch-all of "other INS documentation subject to BMV Driver Services approval." On information and belief, this catch-all includes all INS official documents which indicate an address and other identifying information for the individual.

27. The September 30, 2002 Rule provides that "secondary documents" include any primary document as well as a list of documents which identifies the individual including such things as: certified academic transcripts, consulate-issued identification cards, professional licenses, W-2 forms, etc.
28. The September 30, 2002 Rule provides that the proof of Indiana residency documents include the documents listed as primary documents or secondary documents, provided the documents contain the applicant's name and residential address. Other documents containing the applicant's name and address are acceptable as proof of residency.
29. The September 30, 2002 Rule has been, and continues to be, imposed without rule-making or formal promulgation of regulations.
30. Although the September 30, 2002 Rule requires that applicants present a United States birth certificate, valid United States Passport, or acceptable INS documentation in order to receive a driver's license, permit or identification card, there are various categories

of persons who are person who are residents of Indiana and who are statutorily entitled to receive a driver's license, but who may not possess the documentation noted as primary documents. This would include, but not be limited to:

a. Citizens of the United States who have lost the originals of their birth certificates and who do not have a passport. These persons will not have any primary documents even if they have a wealth of other information indicating their identities.
b. Non-citizens without valid immigration status who have applied for lawful status. For example:
    1. A victim of domestic violence may apply for adjustment of her or his status under the Violence Against Women Act, PL 103-322, 8 U.S.C. § 1154(a)(1), regardless of her or his immigration status. While the application is screened the person will not have any INS documentation fitting the requirement of a primary document in the September 30, 2002 Rule. Nevertheless, when the application is approved, the applicant will receive this documentation.
    2. Under Section 245(i) of the Legal Immigration Family Equity Act, PL. 106-553, and its 2000 amendments, certain non-citizens who entered the United States unlawfully were allowed to adjust their status if they paid a $1,000 penalty and if certain papers were filed with the

Immigration and Naturalization Service by April 30, 2001. Because of large federal backlogs, many of the persons protected by this federal statute have still not been notified of the adjustment of their status to that of legal non-citizen. They therefore will not have documentation which satisfies the requirements of primary document under the September 30, 2002 Rule.

3. Other persons who are not citizens, but who are residents or who are otherwise entitled under Indiana law to receive a driver's license, and who have requests to adjust their status pending under other INS programs who do not, therefore, have INS documentation which satisfies the requirements of primary document under the September 30, 2002 Rule.

31. Jose Miguel Villegas is a resident of Marion County, Indiana.
32. He resides with his spouse who is a lawful permanent resident.
33. Mr. Villegas is not a native of the United States and entered into the United States without INS documentation.
34. He has filed to adjust his status with the Immigration and Naturalization Service.
35. In April of 2002, prior to the changes in the requirements for obtaining a driver's license, learner's permit, or state identification, Mr. Villegas applied for, and received, a learner's permit from the State of Indiana.

36. In December of 2002, Mr. Villegas returned to a license branch to take the steps necessary to receive a driver's license. At that time he was informed that he could not successfully apply for a license.
37. He could not receive a license because, at this point, he is without a social security number, work authorization, and does not have any of the information described as Primary Documents in the current Indiana Bureau of Motor Vehicles Identification and Documentation List.
38. Mr. Villegas wishes to obtain a valid Indiana driver's license.
39. Betty Doe entered into the United States from Mexico without inspection and documentation and has lived in Indiana for three years.
40. Prior to that time, Ms. Doe resided in New York.
41. Ms. Doe has had, in the past, a valid Indiana driver's license although she dose not have a social security number.
42. She obtained her driver's license by going to the license branch and showing her Mexican passport, birth certificate, and credit cards.
43. Ms. Doe's driver's license was stolen and when she returned to the license branch this year to try to obtain a new license she was told that she could not receive a license since she did not have the information required by the defendant's requirements as set out above.
44. Ms. Does wants to get her driver's license back.
45. Mary Smith entered the United States without inspection and documentation and has been an Indiana resident for four years.

46. Ms. Smith has a Mexican birth certificate and an Individual Temporary Identification Number (ITIN) issued by the Internal Revenue Service. However, she has no documents issued by the Immigration and Naturalization Service or its successor agency.
47. Ms. Smith does not have a social security number.
48. In July of 2002, Ms. Smith went to a branch of the Bureau of Motor Vehicles to obtain an Indiana identification card.
49. She was informed by employees at the Bureau of Motor Vehicles that she could not obtain an identification card or license since she did not have sufficient proof of her identity.
50. She therefore was not able to obtain the identification card.
51. She is aware that under the current rule, she cannot obtain an identification card or license because she does not have sufficient proof of identity.
52. She still wants a state identification card and would like a learner's permit and, eventually, a driver's license.
53. The September 30, 2002 Rule is causing plaintiffs and the putative class irreparable harm for which there is no adequate remedy at law.
54. At all times defendant has acted under color of state law.

Claims for relief

Statutory Claims

55. Defendant's September 30, 2002 rule imposes a requirement that only persons who have a valid immigration status may be considered for an Indiana driver's license, permit, or identification card even if they are Indiana residents. This requirement is not contained in Indiana law and defendant is precluded from creating such a requirement since it alters the substantive law which governs the BMV. The rule change is therefore unlawful.
56. Even if defendant could effect the changes in the law set out in the September 30, 2002 Rule, the rule represents substantive change and therefore cannot occur without rule-making that satisfies the requirements of IND. CODE § 4-22-2-3, *et seq.* Inasmuch as the rule change was implemented without any rule-making whatsoever, it is unlawful.

Federal Constitutional Claims

57. To the extent that the September 30, 2002 rule discriminates against those who are residents of Indiana and who can prove their identities, but who are unable to obtain the information demanded by this rule, the rule is irrational and arbitrary and furthers no legitimate state goal and violates both the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution.

58. To the extent that the September 30, 2002 Rule gives defendant the ability to determine which non-citizens have "acceptable INS documentation" the rule violates the Supremacy Clause, U.S. Constitution, Art. VI.

State Constitutional Claims

59. The disparate treatment accorded by the September 30, 2002 Rule, as summarized above, also violates Art. I, § 23 of the Indiana Constitution since it is not reasonably related to inherent characteristics distinguishing the putative class.

Requested relief

WHEREFORE, plaintiffs request that this Court:

1. Certify the putative class in this cause.
2. Enter a declaratory judgment that the defendant has violated Indiana law and the United States and Indiana Constitutions as specified above.
3. Enter a preliminary injunction, later to be made permanent, enjoining the September 30, 2002 Rule.
4. Award plaintiffs their costs and reasonable attorneys' fees.
5. Award all other proper relief.

by \s\ Kenneth J. Falk
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on the below named person(s) on this 10th day of June, 2003 by first class, U.S. postage, pre-paid.

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Kenneth J. Falk
Attorney at Law

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V provides:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief

was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1988 provides:

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

Indiana Code § 9-24-9-2 provides:

(a) Before January 1, 2008, each application for a license or permit under this chapter must require the following information:

(1) The name, date of birth, sex, Social Security number, and mailing address, and, if

different from the mailing address, the residence address of the applicant. The applicant shall indicate to the bureau:

(A) which address the license or permit shall contain; and

(B) whether the Social Security number or another distinguishing number shall be the distinctive identification number used on the license or permit.

(2) Whether the applicant has been licensed as an operator, a chauffeur, or a public passenger chauffeur or has been the holder of a learner's permit, and if so, when and by what state.

(3) Whether the applicant's license or permit has ever been suspended or revoked, and if so, the date of and the reason for the suspension or revocation.

(4) Whether the applicant has been convicted of a crime punishable as a felony under Indiana motor vehicle law or any other felony in the commission of which a motor vehicle was used.

(5) Whether the applicant has a physical or mental disability, and if so, the nature of the disability and other information the bureau directs.

The bureau shall maintain records of the information provided under subdivisions (1) through (5).

(b) Except as provided in subsection (c), after December 31, 2007, each application for a license or permit under this chapter must require the following information:

(1) The full legal name of the applicant.

(2) The applicant's date of birth.

(3) The gender of the applicant.

(4) The applicant's height, weight, hair color, and eye color.

(5) The principal address and mailing address of the applicant.

(6) A:

(A) valid Social Security number; or

(B) verification of an applicant's:

(i) ineligibility to be issued a Social Security number; and

(ii) identity and lawful status.

(7) Whether the applicant has been subject to fainting spells or seizures.

(8) Whether the applicant has been licensed as an operator, a chauffeur, or a public passenger chauffeur or has been the holder of a learner's permit, and if so, when and by what state.

(9) Whether the applicant's license or permit has ever been suspended or revoked, and if so, the date of and the reason for the suspension or revocation.

(10) Whether the applicant has been convicted of a crime punishable as a felony under Indiana motor vehicle law or any other felony in the commission of which a motor vehicle was used.

(11) Whether the applicant has a physical or mental disability, and if so, the nature of the disability and other information the bureau directs.

(12) The signature of the applicant.

The bureau shall maintain records of the information provided under subdivisions (1) through (12).

(c) For purposes of subsection (b), an individual certified as a program participant in the address confidentiality program under IC 5-26.5 is not required to provide the individual's principal address and mailing address, but may provide an address designated by the office of the attorney general under IC 5-26.5 as the individual's principal address and mailing address.

140 Indiana Administrative Code 7-4-3 provides:

(a) As provided by 140 IAC 7-4-2 *[section 2 of this rule]*, the bureau shall require the documents listed in subsections (b) through (e) as part of the application for an Indiana driver's license, learner/driver education permit, and identification card. Only original documents or certified facsimiles from the issuing agency will be accepted. The bureau reserves the right to refuse any identification presented that appears fraudulent or unreliable. Altered and expired documents will not be accepted. Documents presented to the bureau for identification purposes will be kept confidential. All documents must contain the applicant's name and must be in the English language or be presented with an English translation of the document. The commissioner or the commissioner's designee may accept reasonable alternate documents to satisfy the requirements of this rule and IC 9.

(b) Primary documents-acceptable United States documents are as follows:

(1) United States birth certificate with authenticating stamp or seal containing the applicant's date of birth, place of birth, and parent's names, issued by:

(A) county department or county board of health from the applicant's state of birth;

(B) a state department or state board of health from the applicant's state of birth; or

(C) a verified delayed birth certificate.

(2) Certificate of naturalization/citizenship.

(3) Certification of report of birth (form DS-1350 issued by the United States Department of State).

(4) U.S. consular report of birth (form FS-240 issued by the United States Department of State).

(5) Birth certificates issued by United States territories, including American Samoa, Guam, Puerto Rico, and Virgin Islands.

(6) U.S. military or merchant marine identification card with photo.

(7) U.S. passport.

(8) U.S. veterans universal access identification card with photo.

(9) Indiana driver's license or learner/driver education permit.

(c) Primary documents-acceptable immigration documents are as follows:

(1) Valid foreign passport with photo with a visa that includes a valid form I-94 indicating the authorized duration of stay in the United States.

(2) Valid foreign passport with a current visa that states "Upon Endorsement serves as

Temporary I-551 evidencing Permanent Residence for 1-year" issued by the United States Department of Homeland Security.

(A) Canadian passports are not required to have a visa or a form I-94.

(B) Applicants from the Federated States of Micronesia, Palau, and the Republic of the Marshall Islands are not required to present a visa but must submit a form I-94.

(C) Passports with I-94 (issued by the United States Customs and Border Control or United States Citizenship and Immigration Services) indicating F-1/F-2 status must present a valid form I-20 ("Certificate of Eligibility" issued by the United States Immigration and Customs Enforcement). For these applicants, the form I-20 serves as a secondary document.

(D) Passports with I-94 indicating J-1/J-2 status must be submitted with a valid form DS-2019 ("Certificate of Eligibility" issued by the United States Department of State). For these applicants, the form DS-2019 serves as a secondary document.

(3) Authorization for parole of an alien into the United States (form I-512 issued by United States Citizenship and Immigration Services).

(4) Employment authorization card (I-688B issued by United States Immigration and Naturalization Services).

(5) Employment authorization card (I-766 issued by United States Immigration and Naturalization Services).

(6) Form I-94 stamped with "Section 207" refugee status.

(7) Form I-94 stamped with "Section 208" asylum status.

(8) Permanent resident card (I-551).

(9) Temporary I-551 stamp on a passport.

(10) Temporary resident card (I-688 issued by United States Immigration and Naturalization Services).

(11) Travel document (I-131 issued by United States Immigration and Naturalization Services).

(12) An I-797 "Notice of Action" (issued by United States Citizenship and Immigration Services) indicating an applicant's approval may be used to extend the validity of an original primary document.

(d) Secondary documents-acceptable documents are as follows:

(1) Certified academic transcripts from schools in the United States or its territories.

(2) School report cards from schools in the United States or its territories dated within twelve (12) months of application.

(3) School identification card with photo or yearbook photo from schools in the United States and/or its territories dated within three (3) years of application.

(4) An identification card with photo issued by a foreign consulate.

(5) An identification card with photo issued by the federal government.

(6) An Indiana identification card.

(7) Driver's license, identification card, or permit with photo issued by another state.

(8) Original driving record from another state.

(9) Valid form I-20 with a valid form I-94 and an F-1/F-2 status in passport.

(10) Valid form DS-2019 (issued by the United States Department of State) with a valid form I-94 and a J-1/J-2 status in passport.

(11) Indiana county presentence investigation report with clerk stamp or seal.

(12) Indiana gun permit.

(13) Indiana probation identification card with photo, name, and date of birth.

(14) Letter from probation officer, caseworker, or social worker on official letterhead, certified with stamp or seal, with the applicant's name and signature of the probation officer, caseworker, or social worker.

(15) Prison release documentation.

(16) U.S. district court presentence investigation report with stamp or seal.

(17) Valid banking card or MasterCard, Visa, American Express, or Discover card issued in the name of the applicant with his or her signature.

(18) Bank statement issued within sixty (60) days of application.

(19) Form W-2 (federal or state) or Form 1099 with the applicant's name and address.

(20) Computer-generated paycheck stub with applicant's name and address.

(21) Valid employee identification card with photo.

(22) Valid Indiana professional license.

(23) Valid insurance card.

(24) Medicare or Medicaid card.

(25) U.S. military discharge or DD214 separation papers.

(26) U.S. Uniformed Services Card.

(27) Divorce decree certified by court of law with stamp or seal.

(28) Application of marriage or record of marriage that is certified with stamp or seal.

(29) Applicants under eighteen (18) years of age making application for an Indiana identification card may present acceptable Social Security documentation as a secondary document.

(e) Any document from the list in the primary or secondary group, or any of the documents listed below, may be used as proof of Indiana residency as long as the document contains the applicant's name and current residential address. A post office box is not an acceptable residential address.

(1) Child support check stub from the Indiana family and social services administration with name and address of the applicant.

(2) Change of address confirmation (form CNL107) from the U.S. Postal Service listing the applicant's old and new address.

(3) Bill or benefit statement issued within sixty (60) days of application.

(4) Indiana driver's license, identification card, or permit with photo.

(5) Survey of the applicant's Indiana property produced by a licensed surveyor.

(6) Affidavit of Indiana residency.

(7) Voter registration card.

(8) Valid Indiana vehicle or watercraft title or registration.

(f) Under IC 9-24-9-2, each application for a license or permit must require a Social Security number. Acceptable documents to verify an applicant's Social Security number are the following:

(1) Social Security card.

(2) Social Security card bearing the legend "Valid for Work Only with DHS Authorization".

(3) Social Security card bearing the legend "Not Valid for Employment".

(4) Letter verifying the applicant's Social Security number issued in the applicant's name and signed and stamped by the Social Security Administration.

(5) Numident report stamped and issued in the applicant's name by the Social Security Administration.

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No. 09-161

SUPREME COURT, U.S.
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In The
Supreme Court of the United States

ANDREW J. MILLER,

Petitioner,

v.

MIGUEL VILLEGAS, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Indiana Court Of Appeals

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Were respondents properly awarded attorneys' fees pursuant to 42 U.S.C. § 1988 in a state court action in which: (a) they raised both federal and state law claims; (b) the federal and state law claims arose from a common nucleus of operative fact; (c) respondents prevailed on the state law claim, making it unnecessary to reach the federal law claims; (d) the lower court found, and petitioners do not dispute, that the federal law claims were substantial and fee-generating; and (e) the relief respondents obtained under the state law claim was the same relief that they sought under the federal claims?

PARTIES TO THE PROCEEDINGS

Petitioner is Andrew J. Miller, in his official capacity as Commissioner of the Indiana Bureau of Motor Vehicles.

Respondents are Miguel Villegas, Betty Doe (a judicially sanctioned anonymous name), and Mary Smith (a judicially sanctioned anonymous name), who represent both themselves and a class of those similarly situated. The class is defined as:

> all current and future persons in Indiana who are, or who will be, required by defendant to produce information concerning their citizenship or immigration status in order to obtain an Indiana driver's license or permit or a state identification card, but who are, or will be, unable to produce the identification mandated by the Indiana Bureau of Motor Vehicle's non-promulgated identification requirements.

(App. 52A).

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STATEMENT OF THE CASE

In 2002, the petitioner ("BMV," for Indiana Bureau of Motor Vehicles) instituted, without prior notice or rule-making, a new rule that radically altered the then-existing identification requirements necessary for the issuance of a driver's license, learner's permit, or state identification card. (App. 44A-50A). The effect of the new requirements was to cause many persons, including both persons without lawful immigration status and some persons in the United States with protected immigration status, to be no longer able to receive licenses, permits, or identification cards.

Prior to the challenged 2002 rules, the BMV's identification requirements allowed applicants to present a variety of documents, all of which were assigned a point value. (App. 44A n.4). The applicant had to amass a total of six points. (*Id.*). For example, if the applicant had a license already, he or she would be awarded six points. Three points were earned by, among other things, a birth certificate, passport or certain immigration documents. A credit card with a photograph earned two points, as did, among other documents, a photo-id from school or work, a social security card, or a certified marriage license. There were numerous documents earning one point, including an Indiana voter registration card, a credit card without a photograph, or a Medicare or Medicaid card. There was no requirement that any particular document or category of document be produced.

After the rule change in 2002, applicants were restricted to producing a limited number of documents from specific categories: a primary document such as a certified birth certificate or other similar documents; documents proving Indiana residence; and, under certain situations, enumerated secondary documents. (App. 45A-50A). Under the new rules those who sought licenses, but not identification cards, had to also produce proof of their social security number. (App. 45A n.5).

The named plaintiffs in this case had been entitled to licenses or identification cards prior the change in 2002. Both Mr. Villegas and Ms. Smith desired to obtain a license or identification card and were now precluded from doing so. (App. 58A-59A). Ms. Doe had a license under the former rules, but after it was stolen could not get it replaced because of the new rules. (App. 51A, 76A, 91A).

Contrary to the BMV's claims (Petition at 5), neither before the change nor immediately after were applicants required to have a social security number. First, there was no requirement in Indiana law or BMV procedure that any applicant present information concerning a social security number before obtaining an identification card from the BMV. (App. 58A). Second, although Indiana law required that those who had social security numbers present the number when applying for a license, those who had never been issued a social security number were allowed to complete an affidavit attesting to the fact that they did not have a social security number. (App.

55A-56A). In its original opinion mandating that judgment be entered for the respondents ("the class"), the Indiana Court of Appeals stated that "[t]o this day, the BMV's website provides, 'If the applicant does not have a Social Security Number, the applicant must complete the BMV Social Security Affidavit.'" (App. 55A-56A & n.10).

Respondents filed this class action in Indiana state court claiming that the new rule violated rule-making and other requirements imposed by Indiana law, IND. CODE § 4-22-2-13, *et seq.*, and also violated the Indiana and United States Constitutions. The relief sought on all claims was identical; an injunction barring enforcement of the new rules. (App. 94A). The trial court entered judgment for the BMV and dismissed all claims. (App. 80A). The Indiana Court of Appeals, however, reversed, and granted to the class the precise relief they requested – the voiding of the new rules. (App. 68A). The Court of Appeals only found it necessary to reach the state law rule-making claim, holding that the new requirements were unlawful under Indiana law and remanding "the case with instructions for the trial court to enter summary judgment in favor of the plaintiffs." (App. 68A). The trial court entered the appropriate order. (App. 38A-39A).

The class then sought attorneys' fees pursuant to 42 U.S.C. § 1988 and the trial court granted the request. (App. 35A-37A). The BMV appealed this decision to the Indiana Court of Appeals, which affirmed the fee award. (App. 3A-34A).

In its fee decision, the Court of Appeals noted that the BMV had, following its earlier decision, promulgated new identification requirements. (App. 8A). These new requirements were more expansive than those that had been voided, allowing some previously disqualified class members to obtain licenses or identification cards.[1] In response to the BMV's argument that respondents did not qualify as prevailing parties the Court of Appeals concluded that their undecided constitutional claims were substantial and arose out of a common nucleus of operative fact with the successful state law claim. (App. 21A-25A). The Court further held that the

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[1] A comparison of the former identification requirements, (App. 45A-50A), with the promulgated regulations, IND. ADMIN. CODE tit. 140, r. 7-4-3, discloses that persons with additional immigration documents may now obtain licenses, permits, or identification cards. These include non-citizens with:

> – authorization for parole of an alien into the United States (form I-512 issued by United States Citizenship and Immigration Services). IND. ADMIN. CODE tit. 140, r. 7-4-3(c)(3).
>
> – a travel document (form I-131). IND. ADMIN. CODE tit. 140, r. 7-4-3(c)(11).
>
> – a "Notice of Action" (form I-797) that indicates an applicant's approval may be used to extend the validity of an original primary document. IND. ADMIN. CODE tit. 140, r. 7-4-3(c)(12).

Further, under the promulgated identification requirements additional documentation is now allowed to satisfy social security number requirements – Social Security cards that indicate that the numbers are not valid for employment or valid for work only with authorization of the Department of Homeland Security. IND. ADMIN. CODE tit. 140, r. 7-4-3(f)(2),(3).

respondents were prevailing parties in that the earlier appellate decision had given them "all the relief they had asked for: the identification rule was declared void and without effect." (App. 29A).

ARGUMENT

Reasons for denying the writ

Plenary review in this case is inappropriate for three reasons. First, the trial court and the Indiana Court of Appeals properly applied the well-established test, adopted by this Court, for awarding fees where fee-generating claims in litigation are not resolved but plaintiffs are successful on a pendent non-fee generating claim. The BMV does not argue that it was inappropriate to apply this test, nor does it dispute the lower courts' application of this test. Nor, for that matter, does it claim that plenary review is necessary to resolve any conflict in the lower courts concerning the test's application.

Second, in its efforts to contort this well-recognized test, the BMV suggests that a new test for prevailing party status should be established that would make attorney fee awards dependent not on whether the plaintiffs prevailed and obtained exactly what they sought in the litigation • as they most certainly did in this litigation • but rather on the results of an analysis that looks beyond the litigation to determine if the plaintiffs achieved what the trial court concludes was their aspirational goal. The

Indiana Court of Appeals properly rejected this unique argument for which there is no support and which violates this Court's established definition of "prevailing party." Moreover, even if a court can look beyond the relief granted in the case to determine prevailing party, the BMV's argument ignores the fact that the regulations promulgated following the decision on the merits in this case expanded the documents acceptable for identification, thus allowing some class members to obtain their licenses, permits, or identification cards.

Third, the BMV also suggests that the established test for prevailing party status in this circumstance should be ignored where the result of the litigation does not foreclose the plaintiffs from raising the unresolved federal claims in separate future litigation. This argument was not raised in the courts below and is waived. *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-46 (1992). In any event, it is nothing more than an invitation for this Court, in the face of its clear precedent and in the absence of any conflict in the lower courts, to reconsider the well-accepted analysis under 42 U.S.C. § 1988, and the BMV has presented no compelling reason for doing so.

A. This case presents no conflict with any precedent but instead represents appropriate application of well-established jurisprudence

The purpose of the Civil Rights Attorneys' Fee Awards Act of 1976 (42 U.S.C. § 1988) "is to ensure

'effective access to the judicial process' for persons with civil rights grievances." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (citing H.R. REP. No. 94-1558, p. 1 (1976)). Recognizing the reality that constitutional claims and non-fee generating statutory claims may be raised together, and that "the most fundamental principle of constitutional adjudication is not to face constitutional questions but to avoid them, if at all possible," *United States v. Lovett*, 328 U.S. 303, 320 (1946) (Frankfurter, J., concurring), this Court noted shortly after the enactment of § 1988 that it is "clear that Congress intended fees to be awarded when a pendent constitutional claim is involved, even if the statutory claim on which the plaintiff prevailed is one for which fees cannot be awarded under the Act." *Maher v. Gagne*, 448 U.S. 122, 133 n.15 (1980). In *Maher* the Court cited directly from relevant legislative history, noting that in a bill substantially identical to that which became 42 U.S.C. § 1988 the House Report stated:

> [t]o the extent a plaintiff joins a claim under one of the statutes enumerated in H.R. 15460 with a claim that does not allow attorney fees, that plaintiff, if it prevails on the non-fee claim, is entitled to a determination on the other claims for the purpose of awarding counsel fees ... In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive. *Hagans v. Lavine*, 415 U.S. 528 ... (1974). In such

> cases, if the claim for which fees may be awarded meets the "substantiality" test, see *Hagans v. Lavine*, *supra; United Mine Workers v. Gibbs*, 383 U.S. 715 . . . (1966), attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a "common nucleus of operative fact." *United Mine Workers v. Gibbs*.

Id. (quoting H.R. REP. NO. 94-1558, p. 4 n.7 (1976)).

The BMV does not dispute that *Maher* sets out the relevant test where a decision is entered on a non-fee claim and the pendent fee claims are left undecided. Nor does it dispute that the state law claim on which the class prevailed in this case arose out of a common nucleus of operative fact with the federal claims. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966). Nor does it argue that the federal law claims, not decided below, are not "substantial" as that term is defined in *Hagans v. Lavine*, 415 U.S. 528, 536-38 (1974). Rather, the BMV's contention is that the lower courts misapplied these well-established standards in this case. Even if true, this does not establish grounds for granting plenary review. SUP. CT. R. 10. Moreover, the courts below reached the correct result in awarding the class attorneys' fees.

The BMV argues that *Smith v. Robinson*, 468 U.S. 992 (1984), where this Court refused to allow an award of fees where non-fee claims were decided and

an unaddressed constitutional claim was not, compels a conclusion that the Indiana courts erred below. However, *Smith* is nothing more than an application of the formula articulated in legislative history and approved in *Maher*. Indeed, this Court in *Smith* reiterated the *Maher* standard. *Id.* at 1006-07. This Court emphasized in *Smith* that the unresolved federal claim and the non-fee claims not only involved entirely separate theories, but "more important, would have warranted entirely different relief." *Id.* at 1015. It is clear from that decision that the claims did not arise from a common nucleus of operative fact. The non-fee claims addressed the question of which agency was required to pay for the child's education and the federal constitutional claims sought only a declaratory judgment that state special education hearing regulations did not comply with due process and federal law and an injunction, not on behalf of the petitioners, to protect others in future administrative hearings. *Id.*

The contrast here is clear. The relief sought by the class on both the state law and federal claims was identical • invalidation of the challenged regulations. And, all claims arose from the exact same circumstance • the BMV's creation of the new identification procedures. This is a common nucleus of operative fact, and the BMV does not argue to the contrary. As the First Circuit noted in responding to a claim that the case before it was analogous to the situation in *Smith*, thus precluding a fee award, "[t]his case does not present that situation; the facts arise from a

common nucleus of operative fact, and the theories are but different statutory avenues to the same goal." *Paris v. United States Dep't of Hous. and Urban Dev.*, 988 F.2d 236, 240 (1st Cir. 1993).

B. The BMV's Petition asks this Court to abandon accepted law in favor of an uncertain and unsupported test for prevailing party status that depends not on whether the plaintiffs obtained the relief they requested but on a subjective assessment based on a review of facts occurring after the conclusion of the litigation

This Court, in synthesizing its cases concerning 42 U.S.C. § 1988, has noted that "a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992). This material alteration is established by "enforceable judgments on the merits and court-ordered consent decrees." *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 604 (2001). "Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement." *Farrar*, 506 U.S. at 111. Here, the class obtained a judicial order from the Indiana Court of Appeals striking down the BMV identification requirements. Therefore, the lower courts held,

entirely consistent with this Court's jurisprudence, that the class prevailed.

In urging this Court to review this case, the BMV asks this Court to abandon its jurisprudence and allow courts to deny fees, not because the plaintiffs have not prevailed and benefitted in the sense of obtaining a judgment granting them all the relief requested, but on the ground that the relief obtained does not satisfy what the trial court subjectively concludes is the "real" or aspirational goal of the litigation, which can occur only after the litigation is over and the trial court in some way assesses its effect. Thus, the BMV argues that it is irrelevant that the class obtained through a final judgment exactly what it asked for in the litigation because what the class really wanted was the ability to obtain licenses, permits, and identification cards, which is again foreclosed to some of the class under the new rules promulgated after the Indiana Court of Appeals voided the former requirements. The BMV claims that a court should wait until after the litigation is over, see what effect it has, and then look into the minds of plaintiffs and deny fees if it concludes that the plaintiffs did not obtain what they really desired in the litigation.

In addition to being contrary to the explicit holdings of this Court noted above, and unsupported by any jurisprudence whatsoever, the BMV's argument is factually incorrect. Although persons without any lawful status are again unable to obtain licenses, permits, or identification cards under the

promulgated regulations, the promulgated regulations did substantially expand the identification that had been acceptable under the voided rules. *See supra* note 1. These changes provided the opportunity for those members of the class with this now-allowed documentation to obtain licenses, permits, and identification cards. Accordingly, this case is an inappropriate vehicle for this Court to reexamine its unquestioned and well-accepted precedent. Even under the BMV's argument this, in and of itself, is sufficient to establish that the class prevailed. "[T]he prevailing party inquiry does not turn on the magnitude of the relief obtained." *Farrar*, 500 U.S. at 114.[2]

Furthermore, the test that the BMV proposes is impractical and illogical. While it is true that the ultimate regulations promulgated by the BMV did not allow the named plaintiffs and undoubtedly some members of the class to obtain licenses, permits or identification cards, there was no way for any court to know this when the Court of Appeals invalidated the challenged regulations and thereby gave the class all the relief it sought. It was entirely possible for the BMV, in response to the Court of Appeals' decision, to have determined that even persons without status

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[2] The BMV does not argue to this Court, and did not argue to the Indiana courts, that the amount of fees awarded to the class is erroneous. It has argued only that the lower courts erred in finding that the class is a prevailing party in this litigation for purposes of the receipt of fees under 42 U.S.C. § 1988.

could obtain licenses, permits, or identification cards. *See, e.g., League of United Latin American Citizens (LULAC) v. Bredesen*, No. 3:04-0613, 2004 WL 3048724 (M.D. Tenn. Sept. 28, 2004) (refusing to grant a preliminary injunction against Tennessee rule that allowed persons without lawful status to be issued a license inscribed with "FOR DRIVING PURPOSES ONLY • NOT FOR VALID IDENTIFICATION"). If the BMV had chosen to take this action, would the BMV now concede that the class prevailed, despite the fact that the exact same appellate decision was made and the exact same judgment was entered? Such a concession, mandated by the BMV's argument, would appear to violate the principles of *Buckhannon*, which require the focus to be on the judicially sanctioned relief awarded in the litigation and not on whether the plaintiffs can be deemed to be a catalyst to the defendants' change. 532 U.S. at 601-08. The award of attorneys' fees does not, and cannot, require a court to wait to evaluate the post-judgment effect of litigation to determine if the plaintiffs ultimately obtained what they actually desired in the litigation, regardless of the fact that the plaintiffs received all the relief that they requested in their complaint. This Court's clear mandate is to avoid such a metaphysical inquiry and instead focus on whether the plaintiff "obtain[ed] at least some relief on the merits of his claim." *Farrar*, 506 U.S. at 111. The class here obtained the precise relief it requested • invalidation of the challenged regulations • and therefore the Court of Appeals' decision "materially alter[ed] the legal relationship between" the BMV

and the class "by modifying the [BMV's] . . . behavior in a way that directly benefit[ed]" the class. *Id.* at 111-12. The BMV advances no reason why this Court should abandon this settled jurisprudence.[3]

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[3] In its Petition, at pp. 13-14, the BMV cites a series of cases for the proposition that there are "debates" among lower courts over the meaning of "directly benefit" as used in *Farrar*. There is no such debate and the cases cited by the BMV all conform, as does this case, to the basic requirement that in order to receive attorneys' fees the relief granted the plaintiff must "materially alter[ ] the legal relationship between the parties by modifying defendant's behavior in a way that directly benefit[ ] the plaintiff." *Id.* at 111-12. Thus, fees were denied in *Barnes v. Broward County Sheriff's Office*, 190 F.3d 1274 (11th Cir. 1999) where the plaintiff prevailed only on a claim concerning the use of pre-employment psychological testing that was unrelated to his claim of discrimination and therefore, the injunction of such testing did not directly benefit him in any way at the time of the decision. *Id.* at 1278. In *Martinez v. Wilson*, 32 F.3d 1415 (9th Cir. 1994), the court refused to allow fees to plaintiffs who did nothing but vindicate the general interest in having government obey the law, thereby not obtaining any direct benefit in a case that had become moot through changes in federal law. *Id.* at 1422. In *Roark & Hardee LP v. City of Austin*, 522 F.3d 533 (5th Cir. 2008), fees were not allowed after a favorable constitutional decision on the merits challenging the constitutionality of an ordinance was reversed by the appellate court leaving only a holding, not appealed on the merits, that due process required expeditious judicial review when the ordinance was applied. *Id.* at 556. And, in *Johnson v. Lafayette Fire Fighters Ass'n Local 472*, 51 F.3d 726 (7th Cir. 1995), the court, applying the now rejected "catalyst theory" found that the defendant had altered its actions as a result of the lawsuit and therefore, under *Farrar*, there had been a material alteration of the legal relationship between the parties. *Id.* at 730-31. These cases illustrate various factual scenarios where courts have applied the rule of *Farrar* and other cases from this Court's attorney fee jurisprudence,

(Continued on following page)

C. The BMV's argument, raised for the first time in this Court, that fee awards should be denied if the fee-generating claims are not precluded in future litigation has no support in case law and is nothing more than a request that this Court revise its current and well-accepted jurisprudence

Existing jurisprudence, without conflict, therefore supports the lower courts' decision in this case. The BMV nevertheless argues that this case presents a new question • whether fees under 42 U.S.C. § 1988 should be available where a decision on the non-fee claim does not shield against a future case raising the federal claims even though the plaintiff prevailed in the original litigation on a non-fee ground. This question does not justify plenary review: it was not raised in the lower courts, it has not been addressed by any other court, and it is not meritorious. It is, fairly understood, merely a continued expression by the BMV of dissatisfaction with the applicable rules and standards that lower courts routinely and consistently apply when deciding whether to award fees.

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thus demonstrating that the BMV's real concern is only how this jurisprudence was applied in this case. The case at bar is another such illustration in which, unlike the cases cited above where fees were denied, the plaintiffs obtained the precise relief they requested through the final judgment mandated by the Court of Appeals.

The BMV's brief to the Court of Appeals on the attorneys' fee issue argued only that the class did not prevail on its federal constitutional claims because: 1) the trial court originally found against the class on all claims and this decision was not overturned by the original Court of Appeals decision reversing the trial court and mandating judgment for the class; 2) the undecided federal claims did not meet the "common nucleus" and "substantiality" requirements of *United Mine Workers*, 383 U.S. at 725, and *Hagans*, 415 U.S. at 536-38; and 3) an award of fees is inappropriate because the class had failed to obtain the objectives of their federal claims. (Respondents' Appendix, App. 1-App. 3). Having failed previously to raise its argument concerning "shielded" and "unshielded" claims, the BMV may not raise this claim now for the first time. *Taylor*, 503 U.S. at 645-46. This alone suffices as a reason for this Court to deny plenary review.

Moreover, the BMV is raising an issue that is hardly uncommon, that has generated no judicial commentary, and on which there is no conflict in the case law. When a court strikes down a statute, rule, or other governmental action on state law grounds, rendering it unnecessary to rule upon the pendent federal claims, it is frequently the case that the federal law claims may be renewed in subsequent litigation depending on how the defendants respond to the judgment based on state law. There is no reason to create new law to address that situation for the simple reason that, when it arises, courts routinely

and properly resolve it by application of the well-established principles summarized in *Maher*.

For example, in *Southwestern Bell Telephone Co. v. City of El Paso*, 346 F.3d 541 (5th Cir. 2003), the telephone company challenged actions of a governmental water improvement district as violating both state law and federal law. The company prevailed on a state law claim and the federal claim was therefore not resolved. In the BMV's parlance the federal claim was "not shielded" because a change in state law would allow the identical federal claims to be made. Nevertheless, fees under 42 U.S.C. § 1988 were awarded based on an application of the above cited principles in *Maher*. *Id.* at 510-11. In *California State Outdoor Advertising Ass'n, Inc. v. California*, No. S-05-0599, 2006 WL 662747 (E.D. Cal. Mar. 16, 2006), the plaintiffs claimed that a permit fee for outdoor advertising was not properly promulgated as required by California law and that it violated the First Amendment. The court ruled in favor of the plaintiff on the procedural state law claim only, *id.* at *3-4, thereby leaving the federal claim "not shielded" in that the exact same federal issue could be raised if the defendant properly followed the procedural requirements of California law. The case therefore presented the identical posture as the case at bar. In awarding fees the court relied on *Maher*. *Id.* at *8-10. Similarly, in *Bangs v. Town of Wells*, 834 A.2d 955, 957 (Me. 2003), the plaintiff prevailed on a state law claim that an ordinance barring mobile home expansion had not been enacted in compliance with

state law procedural requirements, while not deciding plaintiff's substantive federal constitutional claim. The federal law claims were "not shielded" • the town was free to impose the same challenged substantive requirements after following the proper statutory procedure. Nevertheless, fees were allowed following application of the principles set forth in *Maher*. *Id.* at 958-59.

The BMV's argument is nothing more than an argument, unsupported in the case law, against *Maher*. To adopt the BMV's solution • preventing the award of fees where the federal claims are not precluded from being raised in future litigation • would be to run directly counter to this Court's pronouncement that it is "clear that Congress intended fees to be awarded when a pendent constitutional claim is involved, even if the statutory claim on which the plaintiff prevailed is one for which fees cannot be awarded under the Act." *Maher*, 448 U.S. at 133 n.15. No court has doubted the ability to award fees in this situation and there are no grounds for grant of plenary review.

CONCLUSION

For the reasons stated above, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE
INDIANA COURT OF APPEALS

No. 49A02-0708-CV-754

JOEL SILVERMAN, *et al.*, Appellants (Defendants below), v. MIGUEL VILLEGAS, *et al.*, Appellees (Plaintiffs below).	Appeal from the Marion Superior Court, No. 2 Trial Court Cause Number 49D03-0208-PL-1448 The Honorable Patrick McCarty, Judge

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SUMMARY OF THE ARGUMENT

The trial court erred in awarding attorney fees because the Plaintiffs were not prevailing parties under 42 U.S.C. § 1988 with respect to their federal constitutional claims. Prior to the first appeal, the trial court determined that the Plaintiffs had suffered no injury with respect to their federal constitutional claims and that determination was not overturned by the previous decision of this Court. Consequently, the Plaintiffs did not prevail on their federal constitutional claims. In addition, the constitutional claims advanced by the Plaintiffs were not vindicated in circumstances where this Court did not strike down the actual identification requirements as contrary to law but instead, merely determined that the requirements had to be formally adopted as rules. The "common nucleus" and "substantiality" theories do not warrant attorney fees in such circumstances. An award of fees is inappropriate where the Plaintiffs failed to obtain the objectives of their federal constitutional claims.

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No. 09-161

IN THE

Supreme Court of the United States

ANDREW J. MILLER,

Petitioner,

v.

MIGUEL VILLEGAS, et al.,

Respondents.

On Petition for Writ of Certiorari to the Indiana Court of Appeals

REPLY IN SUPPORT OF THE PETITION

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REPLY IN SUPPORT OF THE PETITION

Respondent Miguel Villegas[1] argues that the Indiana Bureau of Motor Vehicles' ("BMV") Petition asks the Court to depart from well-established precedent regarding when a party has "prevailed" sufficient to justify an award of Section 1988 attorney fees. Villegas Br. 10. The BMV has asked for no such thing. To the contrary, the BMV urges the Court to reaffirm its established doctrine by summarily reversing the lower court's erroneous application of the Court's precedents.

According to Villegas, "the Indiana Court of Appeals properly applied the well-established test, adopted by this Court [in *Maher v. Gagne*, 448 U.S. 122 (1980)], for awarding fees where fee-generating claims in litigation are not resolved but plaintiffs are successful on a pendent non-fee generating claim." Villegas Br. 5. Proper Section 1988 analysis does not end with *Maher*, however—a party cannot "prevail" for Section 1988 purposes merely by showing that an undecided federal claim was substantial and arose out of a common nucleus of operative fact with a successful state-law claim. Rather, as the Court held in *Farrar v. Hobby*, "a plaintiff 'prevails'" *only* "when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that *directly benefits the plaintiff*." 506 U.S.

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[1] For ease of reference, this brief will refer to the entire Respondent class as "Villegas."

103, 111-12 (1992) (emphasis added). This case is about applying *Farrar*, not about overruling *Maher*.

I. Villegas Has Not Established That Any Member of the Plaintiff Class Has "Directly Benefited" From This Litigation

Villegas has never attempted to demonstrate that any named plaintiff or member of the plaintiff class has directly benefited from this litigation, and, in point of fact, the BMV policy never changed in a way that could have benefited anyone. Thus, summary reversal is appropriate.

1. The best Villegas offers is to contend that the BMV's properly promulgated rule "expanded the documents acceptable for identification, thus allowing *some* class members to obtain their licenses, permits, or identification cards." Villegas Br. 6 (emphasis added). Even on its face the truth of that contention is far from self-evident, particularly since no named plaintiff (all of whom are illegal immigrants) actually fits within the class of individuals bearing valid but previously unlisted INS documentation. Indeed, Villegas's argument is conceivable only because of an exceedingly broad class definition that bears no relation to the original objectives of the lawsuit.

Notably, the plaintiffs did not receive class certification until *after* the trial court had already dismissed their claim for lack of standing. *See* Pet.App. 6A-7A. The trial court's *nunc pro tunc*

order certified the class as "all current and future persons in Indiana who are, or who will be, required by defendant to produce information concerning their citizenship or immigration status in order to obtain an Indiana driver's license or permit or a state identification card, but who are, or will be, unable to produce the identification mandated by the Indiana Bureau of Motor Vehicle's non-promulgated identification requirements." Pet.App. 7A. Because the case had already been dismissed, the trial court's certification of this extremely broad class was granted with no expectation of any benefit to the class. Furthermore, with the case already disposed of, the trial court judge had little reason or incentive to examine the class closely or to ask the plaintiffs to narrow it in any way.

The breadth of the plaintiff class makes it impossible to suggest with any confidence that any class members benefited from this litigation. In a typical class action where a class representative actually shares relevant characteristics with class members, victory for the class representative means victory for all or most of the class. Here, however, the whole point of the lawsuit was to enable illegal immigrants such as the named plaintiffs to obtain state identification, but the technical "victory" the representative plaintiffs received yielded nothing of the sort, nor anything else benefiting them (or anyone else, so far as the record shows).

Nonetheless, the plaintiff class is so wildly diverse that Villegas feels comfortable speculating

that "some" members must have benefited in some way. *See* Villegas Br. 6. A victory that provides only a hypothetical benefit to a hypothetical class member, however, is a prototypical "technical victory" that cannot justify fees. *See Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989) ("[A] technical victory may be so insignificant . . . as to be insufficient to support prevailing party status."). Without a concrete benefit to the named plaintiffs or, at the very least, some reasonably certain benefit to a larger class, the rationale behind awarding fees crumbles.

2. More fundamentally, Villegas is simply wrong to say that the BMV's new regulation expanded the range of acceptable documents. While the later (valid) rule expressly identified a few additional INS documents, the prior (invalidated) policy provided that INS documentation not expressly listed was still acceptable. *See* Pet.App. 88A ("The rule provides a specific listing of INS documents. It also provides a catch-all of 'other INS documentation subject to BMV Driver Services approval.'"). Thus, even before this lawsuit, Indiana residents bearing the INS documents specifically delineated by the BMV's later promulgated rule would have been eligible for licenses and identification. The newly promulgated rule in effect added nothing and therefore could have benefited no one.

Furthermore, there is no way in which the Court of Appeals decision itself could have benefited the named plaintiffs or members of the class. The Court

of Appeals remanded the case to the trial court for further proceedings, but did *not* enjoin the BMV from enforcing the announced rule. *See* Pet.App. 68A. Before the Court of Appeals certified its decision as final to the trial court, the BMV petitioned the Indiana Supreme Court to accept the case on discretionary review. Pet.App. 8A. The BMV's petition automatically stayed certification of the Court of Appeals' judgment, which means it did not go into effect before the BMV promulgated its new administrative rule. Ind. Appellate Rule 65(E). Villegas—who does not acknowledge these facts—cannot claim that the plaintiff class benefited from a decision that never went into effect.

II. The Decision Below Departs From Federal Circuit Court Holdings Requiring That a Plaintiff Actually Benefit From a Final Judgment to Receive Section 1988 Fees

As the BMV explained in its Petition, some federal circuits disagree as to when a judgment directly benefits a plaintiff sufficient to justify an award of Section 1988 fees. *See* Pet. 13-14. In contrast with the decision below, however, these circuits *all* agree that at least *some* direct benefit to the plaintiffs resulting from the litigation is necessary to justify fees. Federal circuits also agree, again in tension with the decision below, that courts must look closely for a material alteration of the relationship of the parties, rather than for a mere judicial stamp of approval on a plaintiff's claim. A victory that does not put the plaintiff in a better

position is not, in the federal circuits, a victory. The Indiana Court of Appeals, however, ignored the lack of demonstrable benefit to the plaintiff class; that error justifies reversal.

1. In *Barnes v. Broward County Sheriff's Office*, the Eleventh Circuit held that "a plaintiff must obtain some benefit from the defendant *at the time the litigation ceases*[,]" to achieve prevailing party status. 190 F.3d 1274, 1279 (11th Cir. 1999) (emphasis added). The court found that the plaintiff, who alleged violations of the Americans with Disabilities Act and the Age Discrimination in Employment Act, was not a proper recipient of attorney fees despite his success on his ADA claim against the sheriff's office. *See id.* at 1276, 1279. Even though the trial court enjoined the County from administering a psychological test as part of its deputy exam, the Eleventh Circuit held that because there was no evidence that the sole plaintiff, Barnes, intended to re-apply for the deputy position or was even eligible to do so, the trial court's decision neither changed the relationship between Barnes and the county, nor directly benefited Barnes. *See id.* at 1278. Thus, because he did not benefit from a technical victory, Barnes was not a prevailing party entitled to receive fees. *See id.* at 1278, n.3.

2. In *Martinez v. Wilson*, the Ninth Circuit held that although the plaintiffs succeeded on their claims, because the amount of funding that they received had actually decreased due to the litigation, the plaintiffs did not directly benefit in a way that

made them prevailing parties. 32 F.3d 1415, 1422 (9th Cir. 1994). The court rejected the plaintiffs' argument that despite their failure to secure any monetary benefit, they had an interest in seeing the government follow the law. *Id.*

Villegas' summary of *Martinez*—"the plaintiffs . . . did nothing but vindicate the general interest in having government obey the law, thereby not obtaining any direct benefit in a case that had become moot through changes in federal law" (Villegas Br. 14 n.3)—is an apt description of why the plaintiffs in *this* case do not deserve fees. Here, the plaintiffs raised two issues. First, they claimed that the BMV failed to follow the Indiana Administrative Rules and Procedures Act in promulgating its licensing rules. This claim was upheld by the Indiana Court of Appeals, and during the pendency of its appeal, the BMV responded by properly passing substantially the same rule. Second, the plaintiffs asked the court to find that the BMV's rules were unconstitutional. No court issued a ruling on this claim and Villegas has not been precluded from asserting it anew against the properly promulgated rule.

As the Ninth Circuit understood, forcing the government to follow its own rules does not alone qualify a plaintiff for attorney fees under Section 1988.

3. The Fifth Circuit, in *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 556 (5th Cir. 2008),

denied attorney fees even though the plaintiffs still had a "victory" in the form of a requirement that the government provide judicial due process as part of its city permit and license revocation proceedings. The court found that this was not substantial enough to support fees because the plaintiffs had lost on many of their other claims, and the government could still enforce its license revocation provision (as long as it provided judicial due process). *Id.* Thus the plaintiff must not only directly benefit, but the relief gained must be more than nominal when compared to the relief requested.

Here, plaintiffs received precisely the kind of victory that *Roark* declared insufficient for Section 1988 fees: a "victory" where, after the litigation, the same rules are being enforced, albeit with greater procedural protections. This is not enough, by itself, to be considered a victory, especially when the procedural victory was not even as significant as that in *Roark*, where at least the plaintiffs forced the defendants to provide judicial due process along with permit and license revocation procedures.

4. Villegas dismisses *Johnson v. Lafayette Fire Fighters Association Local 472*, 51 F.3d 726 (7th Cir. 1995), as an application of the "catalyst theory" resulting in a finding that the plaintiffs had achieved a material alteration of the legal relationship between the parties. Villegas Br. 14 n.3. However, Villegas has similarly advanced what amounts to an argument for application of the catalyst theory, which was firmly rejected by this

Court in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001). By relying on the BMV's voluntary edits to the rule during promulgation—edits that were *not* mandated by the Court of Appeals—Villegas is essentially making the argument that this litigation was the catalyst for the (at best) hypothetical benefit the plaintiff class received.

Notwithstanding the Seventh Circuit's application of the catalyst theory, *Johnson* stands for the more fundamental principle that Section 1988 fees are warranted only when the plaintiff has achieved more than a mere technical victory and the judgment recovered substantially matches the recovery sought. *See Johnson*, 51 F.3d at 731 ("This circuit has adopted the three-part test laid out in the concurring opinion of Justice O'Connor in *Farrar* to determine whether a prevailing party has achieved a mere technical victory inappropriate for fees.").

5. In contrast, the Court of Appeals in this case avoided any examination of whether the plaintiffs benefited from the litigation. For example, it ignored the subsequent rule passed by the BMV as "irrelevant," though the Eleventh Circuit declared that the appropriate time to evaluate whether the plaintiff benefited is at the end of litigation. *See Barnes*, 190 F.3d at 1279. The Indiana Court of Appeals also failed to evaluate whether the relief obtained matched the relief sought (as required by the Seventh Circuit) or whether the plaintiff class

obtained the *actual* objective of the litigation or instead scored only a technical or procedural victory (as required by the Fifth and Ninth Circuits).

Accordingly, the Court of Appeals' analysis in this case is in clear tension with federal circuit decisions requiring a direct benefit to the plaintiff before Section 1988 fees may be awarded. The Court should grant review and reverse to eliminate this tension.

III. The BMV Argued Below That Section 1988 Fees Are Inappropriate When Based on Undecided Fee-Generating Claims That May Be Adjudicated Later

Contrary to Villegas's assertions, the BMV has properly preserved the argument that fee claims should not be awarded when the undecided federal claims upon which they are based can be raised anew in a future lawsuit. *See* Villegas Br. 6. The potential for double-recovery of fees has always been an integral part of the BMV's argument that a party should only receive Section 1988 fees if its successful state claim makes adjudication of its federal claims impossible. In its briefs before both the Indiana Court of Appeals and the Indiana Supreme Court, the BMV argued that it would be inappropriate to award Villegas attorney fees for prevailing on a non-fee state law claim only. Supp.App. 8A ("The Plaintiffs obtained nothing more than a technical victory on a state law claim that did not benefit them personally."); Supp.App. 4A ("Furthermore, because

the relief awarded was so inconsequential, it is not hard to imagine that Plaintiffs might yet file another lawsuit seeking to invalidate the formally promulgated identification rule using the same federal claims and theories that they pursued in *Villegas I*."). Thus, it is clear that the BMV has properly raised and preserved this issue and is not, as Villegas contends, "rais[ing] this claim now for the first time." Villegas Br. 16.

Indeed, the Respondents themselves acknowledged the BMV's "shielding" argument in response to the BMV's petition for discretionary review in the Indiana Supreme Court. *See* Supp.App. 2A ("Nevertheless, the BMV attempts to construct a policy argument, completely unsupported by precedent, that fees can not be allowed because if the plaintiffs filed a new case challenging the new promulgated rules on substantive grounds and won, they could get fees again."). Notably, Respondents did not assert at that stage that the BMV had waived this argument. In any event, the BMV properly presented its shielding theory to the lower courts.

Otherwise, Villegas opposes plenary review by citing several cases which he claims demonstrate that when a court strikes down a statue or rule on state law grounds, "it is frequently the case that [any pendent] federal law claims may be renewed in subsequent litigation . . . ." *See* Villegas Br. 16-17 (citing *Southwestern Bell Tel. Co. v. City of El Paso*, 346 F.3d 541 (5th Cir. 2003); *California State*

Outdoor Adver. Ass'n Inc. v. California, No. S-05-0599, 2006 WL 662747 (E.D. Cal. Mar. 16, 2006); *Bangs v. Town of Wells*, 834 A.2d 955 (Me. 2003)). At least two of these cases, however, demonstrate no such thing.

In *Southwestern Bell*, the plaintiff obtained all the relief it sought—the ability to lay telephone lines crossing irrigation ditches without having to apply or provide payment to the county water improvement district—through adjudication of its state law claim. 346 F.3d at 547-49. In *Bangs*, the owner of a mobile home park challenged under state and federal law a town ordinance that prohibited him from expanding his park. 834 A.2d at 957. The Supreme Judicial Court of Maine held that the ordinance violated a state law that required municipalities to provide "reasonable consideration . . . to permit existing mobile home parks to expand their existing locations." *Id.* at 957 n.2 (citing Me. Rev. Stat. Ann. Title 30, § 4358(3)(M)). Thus, the plaintiff requested and received invalidation of the statute on grounds that prevented it from being revived through a procedural fix. In both cases, accordingly, Section 1988 fees were appropriate because the plaintiff would never have a chance for judicial review of the federal claim, in contrast with this case, where the BMV's substantive policy remains intact and susceptible to whatever federal claims Villegas or the plaintiff class wish to raise.

The third case cited by Villegas, *California State Outdoor Advertising Association, Inc. v. California*,

2006 WL 662747 (E.D. Cal. Mar. 16, 2006), where the court invalidated a California permitting scheme until the state agency promulgated it properly, does appear to be on point, though the memorandum decision is less than clear as to whether the First Amendment claim justifying fees was directed at past enforcement (which would make it distinguishable) or future enforcement. Regardless, the existence of this single, unpublished decision, while reinforcing the need for guidance, hardly demonstrates a commonplace understanding among the lower courts that Section 1988 attorney fees are warranted when a plaintiff prevails on a state law claim that does not shield a pendent federal claim from later adjudication. If anything, Respondent's strenuous efforts to identify even one case on all fours with this one underscores just how anomalous the award of fees under these circumstances really is.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: September 15, 2009

IN THE
SUPREME COURT OF INDIANA
NO._____

Court of Appeals Cause No. 49A02-0708-CV-754

Andrew J. Miller, *et al.*,	) Appeal from the
	) Marion Superior
	) Court No. 3
Appellant	)
(Defendant below),	)
	)
v.	) Trial Court No.
	) 49D03-0208-PL-I448
	)
Miguel Villegas, *et al.*,	)
	) Hon. Patrick L. McCarty,
	) Judge
Appellees	)
(Plaintiffs below).	)

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* * *

II. The Plaintiffs are prevailing parties in this case

* * *

Nevertheless, the BMV attempts to construct a policy argument, completely unsupported by precedent, that fees can not be allowed because if the plaintiffs filed a new case challenging the new promulgated rules on substantive grounds and won, they could get fees again. This double recovery potential, argues the BMV, demonstrates why the plaintiffs are not now entitled to fees. Of course, if a plaintiff files a procedural due process claim and wins and then, after process is afforded, files a new case and prevails on substantive constitutional grounds there can be a double recovery as well. What the BMVs argument demonstrates is the fallacy of its singular interpretation of § 1988 that looks not to whether the plaintiffs have obtained I a judicially sanctioned result that alters the legal relationship between the parties today, but instead attempts to peer into the future to make a determination as to whether the plaintiffs "really" prevailed.

* * *

IN THE
SUPREME COURT OF INDIANA
No. _____
Court of Appeals Cause No. 49A02-0708-CV-754

Ronald L. Stiver, et al.,	) Appeal from the
	) Marion Superior Court
Appellants	)
(Defendants below),	) Civil Division, Room 2
	)
v.	) No. 49D03-0208-PL-1448
	)
Miguel Villegas, et al.,	) The Honorable
	) Patrick McCarty, Judge
Appellees	)
(Plaintiffs below).	)

PETITION TO TRANSFER

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* * *

I. The Plaintiffs Are Not "Prevailing Parties"

* * *

There is, therefore, a substantial difference between the relief that was actually achieved by way of the Plaintiffs' state law claim and the relief that would have been achieved under their federal claims. Analyzing the Plaintiffs' success "in the context of what they sought to accomplish," *Mazanec*, 798 F.2d at 237, it is apparent that they did not achieve the goals of their litigation.

Furthermore, because the relief awarded was so inconsequential, it is not hard to imagine that Plaintiffs might yet file another lawsuit seeking to invalidate the formally promulgated identification rule using the same federal claims and theories that they pursued in *Villegas I*. If Plaintiffs were to do that and succeed, obviously they would be entitled to Section 1988 fees. Accordingly, permitting an award of fees here may lead to an anomaly whereby Plaintiffs' counsel is twice awarded Section 1988 attorney fees for a single civil-rights claim: once to underwrite a collateral state-law administrative procedure claim, and once to pay for the Section 1983 claim itself.

Notably, such double recovery of Section 1988 fees would not ordinarily result where a civil-rights plaintiff prevails on a non-fee state law claim

pendent to a Section 1983 claim. If, for example, the Plaintiffs in this case had prevailed on state constitutional substantive rights grounds rather than ARPA grounds, the BMV's identification rule would have been voided in substance with no reasonable likelihood that it would reappear and generate a second lawsuit featuring the same federal claim. Under the particular circumstances of the ARPA relief awarded here, however, that is a distinct possibility. Even if Plaintiffs do not pursue their federal claims anew, the continued availability of those claims on the same terms as before is sufficient to demonstrate why Section 1988 fees are not appropriate here.

Indeed, precisely because follow-on Section 1983 litigation over the ARPA-compliant identification policy is available to these Plaintiffs, to deny fees here would in effect merely be to hold them in abeyance pending the outcome of any re-instituted lawsuit. This is significant because the reason for permitting recovery of Section 1988 fees where a plaintiff prevails on pendant non-fee claims is that Congress did not want such non-fee claims to serve as a fee shield that would deter vindication of federal rights. *See Smith v. Robinson*, 468 U.S. 992, 1006 (1984), *overruled on other grounds by statute/rule* ("Congress' purpose in authorizing a fee award for an unaddressed constitutional claim was to avoid penalizing a litigant for the fact that courts are properly reluctant to resolve constitutional questions if a non-constitutional claim is dispositive."). But that policy is not implicated here. To the extent they have ever had valid claims, these very Plaintiffs still

have a chance at their day in court to vindicate their federal rights at the expense of the State. But because the rule they sought to challenge is still in force (albeit with some inconsequential differences), they have not yet prevailed in a way that is sufficient to justify Section 1988 fees. Accordingly, transfer is warranted to address the important issue whether Section 1988 fees should nonetheless be awarded in such circumstances.

* * *

IN THE
INDIANA COURT OF APPEALS

No. 49A02-0708-CV-754

Joel Silverman, *et al.*,	)	Appeal from the
	)	Marion Superior Court, No.2
Appellants	)	
(Defendants below),	)	
	)	
vi.	)	Trial Court Cause Number
	)	49D03-0208-PL-1448
Miguel Villegas, *et al.*,)		
	)	
Appellees	)	
(Plaintiffs below)	)	The Honorable Patrick
	)	McCarty, Judge

BRIEF OF APPELLANTS

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3. An award of fees is inappropriate where the Plaintiffs failed to obtain the objectives of their federal constitutional claims.

As discussed in the preceding section, the Plaintiffs did not obtain the objectives sought through their federal claims. As illegal aliens, they still cannot obtain Indiana driver's licenses or identification cards and the mere requirement that BMV formally adopt the challenged requirements as rules did not vindicate the federal claims. Fees are not warranted as a result.

In any event, the attorneys for the Plaintiffs are not entitled to an award of attorney fees in circumstances where the attorneys failed to obtain a judgment that provided any useful relief to the Plaintiffs or the Plaintiffs' class.[2] The Plaintiffs obtained nothing more than a technical victory on a state law claim that did not benefit them personally. They were not able to obtain either driver's licenses or identification cards as a result of the case. In circumstances where a plaintiff obtains only a nominal victory, the attorney for the plaintiff is

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[2] This Court stated in *Villegas*, 832 N.E.2d at 604, that the Class was defined as "[A]ll current and future persons in Indiana who are, or who will be, required by defendant to produce information concerning their citizenship or immigration status in order to obtain an Indiana driver's license or permit or a state identification card, but who are, or will be, unable to produce the identification mandated by the Indiana Bureau of Motor Vehicle's non promulgated identification requirements."

usually not entitled to a recovery of attorney fees. Although not directly on point, where a party seeks compensatory damages but obtains no more than nominal damages, he is not usually entitled to an award of attorney fees. *Farrar v. Hobby*, 506 U.S. 103, 115 (1992). As stated by the United States Supreme Court, "[i]n some circumstances, even a plaintiff who formally 'prevails' under § 1988 should receive no attorney's fees at all." *Id.* The Court in *Farrar* made it clear that Section 1988 is not intended to produce windfalls for attorneys. *Id.* This is particularly true where federal claims have not been vindicated by the lawsuit, as in the case at bar.

* * *